SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 476

SEARS, ROEBUCK AND CO.,

Petitioner,

vs.

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO,

Respondent,

AND

CLYDE F. WAERS, REGIONAL DIRECTOR OF THE TWENTY-SEVENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioner, Sears, Roebuck and Co., petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit issued in this case on May 15, 1969. That decision, dismissing petitioner's appeal from the District Court's refusal to grant temporary injunctive relief under Section 10(l) of the National Labor Relations Act (29 U. S. C. § 160(l)) was premised on the ground that petitioner lacked standing to prosecute such an appeal.

OPINIONS BELOW.

The opinion of the Court of Appeals dismissing petitioner's appeal (Appendix A, pp. A1-A6), is reported at ..... F. 2d ....., 71 LRRM 2251. An official transcript of the unreported decision of the District Court refusing to grant injunctive relief under Section 10(l) on the basis that no violation of law had occurred, from which decision petitioner sought to appeal, is attached as Appendix B, pp. A7-A13; the subsequent decisions of the National Labor Relations Board and its Trial Examiner, reported at 176 NLRB No. 120, finding that the charged violations of law had in fact occurred are attached as Appendix C (pp. A14-A18) and D (pp. A19-A63), respectively.

JURISDICTION.

The opinion and judgment of the Court of Appeals dismissing petitioner's appeal were filed and entered on May 15, 1969.

The jurisdiction of this Court to review the Court of Appeals' dismissal of petitioner's appeal is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Where a charging party before the National Labor Relations Board has filed charges alleging it was aggrieved by a union's unlawful picketing, which charges, if they have reasonable basis in fact and law, require the Board's Regional Director to seek injunctive relief, and where the Regional Director does find reasonable cause to believe a violation of law was committed and seeks such injunctive relief, may the aggrieved charging party appeal the District Court's refusal to grant such injunctive relief when the Board's Regional Director is unwilling to do so?

A resolution of this question depends, in turn, upon a resolution of the following issues, among others, which it encompasses:

(1) Does the denial to charging parties of the right to judicial review of cases in which they are conferred express rights in lower courts infringe due process of law?

(2) Does an appeal constitute a new cause or only a continuation of the same cause litigated below?

(3) Does the Norris-LaGuardia Act bar aggrieved charging parties from an appeal in an injunction suit of which a court has already, and properly, taken jurisdiction?

(4) Does Congress' silence on the question of charging parties' appellate rights under Section 10(l) require the conclusion that Congress intended to deny them the right to appeal adverse district court decisions when the Board refuses to appeal?

(5) Are the private rights which the Act recognizes enforceable only in situations in which final Board orders issue, or do they exist as well in proceedings under Section 10(l) for interlocutory relief?

STATUTE INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended, § 61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151 *et seq.* are set forth in the attached Appendix (App. E., pp. A64-A68).

STATEMENT OF THE CASE.

This case originated from charges filed with the Board by petitioner herein, alleging that Respondent union had engaged in enumerated unfair labor practices within the meaning of Sec. 8(b)(4)(i)(ii)B of the Act, 29 U. S. C.

§ 158(b)(4)(i)(ii)B, which proscribes secondary boycotts by unions. After conducting a preliminary investigation of the charges, as required by Sec. 10(l), Respondent Clyde F. Waers, Regional Director of the Board, concluded that there was reasonable cause to believe that Respondent union was engaging in unfair labor practices, as charged by petitioner and that an unfair labor practice complaint should issue. Thereupon, pursuant to Sec. 10(l), Waers filed a petition in the District Court seeking a temporary injunction against the union's unlawful picketing of petitioner's premises (App. F, pp. A69-A77). A hearing on an order to show cause was held during which the petitioner and Respondents participated, as provided in Sec. 10(l). After presentation of evidence the District Court dismissed the petition for temporary injunctive relief on the grounds that the evidence failed to establish a violation of law and that there was "little probability" that the Board would grant the requested relief when the matter was heard on the merits in formal agency proceedings.

Although Respondent Waers persisted in his belief that the union had committed the charged unfair labor practices, as evidenced by the fact that, on behalf of the Board, he "continued" in the prosecution at the agency level of the complaint issued against the union, he refused to appeal the District Court's denial of injunctive relief. Throughout this period the union continued to picket petitioner's premises. Faced with the union's continuing picketing, with the Board's refusal to appeal, and with the prospect of many months of litigation before the Board, petitioner itself sought to appeal the District Court's adverse decision in order to secure the relief from an unlawful boycott which Section 10(l) was designed to afford.

On February 6, 1969, subsequent to the filing of the appeal but prior to oral argument, a Trial Examiner of

the Board issued a Decision on the merits of petitioner's charges, following a formal evidentiary hearing, in which he found that the Respondent union had in fact committed the unfair labor practices charged.

In its decision of May 15, 1969, the Court of Appeals dismissed petitioner's appeal, holding that petitioners lacked standing to appeal for two reasons: first, since Section 10(l) did not expressly grant that right, therefore Congress did not intend its existence; and second, the Norris-LaGuardia Act, 29 U. S. C. A. § 107, which limits courts' jurisdiction to grant injunctive relief, bars such an appeal by any party except the Board. The Court of Appeals did not reach the merits of the District Court's decision.*

On June 20, 1969, the Board rendered its Decision and Order on the merits of the underlying dispute, in which it affirmed the Trial Examiner's finding that Respondent union had engaged in the illegal conduct charged by petitioner and alleged by the Regional Director in his suit for injunctive relief.

It was only after the issuance of the Board's Decision that the union ceased, at least temporarily, its unlawful picketing. The union's petition for review of the Board's Decision is currently pending in the Court of Appeals for the District of Columbia Circuit.

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* In its decision the court further dismissed petitioner's alternative motion to intervene for the purpose of lodging an appeal; what could not be done directly as a party could not be done indirectly through intervention. It is submitted that this conclusion is contrary to this Court's teaching in *United Automobile Workers* v. *Scofield*, 382 U. S. 205, and to *N. L. R. B.* v. *Acme Industrial Company*, 385 U. S. 432, where, on motion, this Court permitted intervention by a party who had not previously participated at any appellate level. To similar effect is *Wolpe* v. *Poretsky*, 144 F. 2d 505 (CA 4, 1944), cert. den. 323 U. S. 777.

REASONS FOR GRANTING THE WRIT.

Certiorari is sought to review an important question involving the appellate rights of charging parties before the Board in proceedings under Section 10(l) of the Act. To charging parties the existence of this right may be synonymous with economic survival in the face of an adverse decision in the district court which the Board, as here, refuses to appeal for reasons unrelated to the merits of the dispute. To the orderly development of law the issue is significant as it involves a clarification of the requirements of due process of law and of the intent of Congress in enacting Section 10(l), it requires a resolution of a conflict in the circuits, it permits this Court to offer needed guidance to divided courts in the correct application of the Norris-La Guardia Act to injunction proceedings under Section 10(l) of the Act, and it enables this Court to void a decision of the Tenth Circuit which is in conflict with this Court's decision in *United Automobile Workers* v. *Scofield* (*Fafnir Bearing Co.*), 382 U. S. 205.

(1) The Denial to Unlawfully Boycotted Charging Parties of a Right to Appeal an Adverse District Court Decision Denying Them Injunctive Relief Violates Congress' Purpose in Enacting Section 10(l).

In enacting Section 10(l) of the Labor Management Relations Act, Congress expressed its concern over the potential harm to neutral employers victimized by unlawful secondary boycotts by requiring the Board to seek injunctive relief whenever it had reasonable cause to believe that an employer's charge of the existence of such unlawful boycotts was meritorious. Congress emphasized its belief in the importance of affording such injunctive relief to aggrieved employers by imposing a mandatory duty on the Board, acting through its Regional Director:

> "If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he *shall*, on behalf of the Board, petition any district court of the United States . . . for appropriate injunctive relief pending the final adjudication of the Board with respect to such matters." (Emphasis added.)

Having thus expressed its conviction that aggrieved, charging parties are entitled to such relief, it is consistent with this Congressional purpose to deny charging parties the right to appeal a district court's erroneous denial of that relief in circumstances where the Board declines to appeal. To attribute to Congress a purpose to deprive charging parties of the right to such an appeal would render the Congressional scheme inconsistent and idiosyncratic: Congress' concern for the welfare of unlawfully boycotted employers gave rise to the existence of an extraordinary remedy in Section 10(l) on their behalf; the duty to seek it was made obligatory on the Board; in order to assure charging parties the fullest opportunity to obtain the relief to which the violation of their substantive rights entitled them Congress expressly conferred upon them independent participatory rights in the district court proceedings which the Board is required to institute on their behalf:

> "Upon filing of any such petition [for injunctive relief] the courts shall cause notice thereof to be served upon any person involved in the charge and such person, *including the charging party*, shall be given an opportunity to appear by counsel and present any relevant testimony." (Emphasis added.)

Under these circumstances, and in the absence of any statutory language or legislative history expressly prohibiting charging parties' right to appeal, Congress cannot reason-

ably be understood to have intended to deny them the right to seek review of an erroneous district court refusal to grant appropriate relief in situations where the Board refuses to do so. Such an assumption requires the conclusion that Congress created a substantive right on behalf of charging parties to an injunction of secondary boycotts, yet afforded them no relief from a violation of that right when the Board, for manpower of budgetary reasons unrelated to the merits of the case, declines to appeal an erroneous denial of that relief.[1] Such a construction is illogical and is inconsistent with the statutory scheme to afford appropriate and prompt relief for described prohibited conduct. It is an established principle of this Court to avoid such idiosyncratic construction of federal legislation. *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381. The opinion below is predicated upon such a construction.

(2) Affirmatively, Charging Parties' Standing to Appeal a District Court's Denial of Injunctive Relief Under Section 10(l) Is Consistent with the Scheme of the Statute.

The fact that the National Labor Relations Act makes no specific reference to charging parties' right to take such appeals does not establish a Congressional purpose to vest appellate rights under Section 10(l) exclusively with the

1. It is true of course, that charging parties' allegations that they had been victimized by an illegal boycott or strike will ultimately be litigated in formal adversary proceedings. In this sense a "remedy" is afforded notwithstanding the denial of injunctive relief. However, this litigation, first before a Trial Examiner, then on review to the Board, extends over many months. When a continuing boycott or strike does irreparable harm to the employer, as the Board's petition for an injunction as well as the statute's provision for injunctive relief admit, then an appealable final order only after so protracted a period constitutes no remedy at all. A victory before the Board, without earlier temporary injunctive relief, would constitute a pyrrhic victory few employers would survive to enjoy.

Board. Rather, Congress' intention must be determined from the totality of the legislative scheme in harmony with ordinary principles of appellate procedure. In *Scripps-Howard Radio, Inc.* v. *F. C. C.*, 316 U. S. 4, 11, in the absence of a provision for Court of Appeals stay orders on statutory appeals from the F. C. C., this Court nonetheless upheld "the conventional power of an appellate court to stay the enforcement of an order pending the determination of an appeal . . . ," and rejected the argument that by its silence Congress had curtailed the parties' right to invoke traditional appellate court powers:

> "These controlling considerations [the existence of time-honored judicial powers and procedures for the prevention of irreparable injury] compel the assumption that Congress would not, without clearly expressing such a purpose, deprive the Court of Appeals of its customary power to stay orders under review. . . . The search for significance in the silence of Congress is too often the pursuit of a mirage. We must be wary against interpolating our notions of policy in the interstices of legislative provisions. Here Congress said nothing about the power of the Court of Appeals to issue stay orders under § 402(6). But denial of such power is not to be inferred merely because Congress failed specifically to repeat the general grant of auxiliary powers to the federal courts."

Analysis of the statutory scheme, together with the Boards' own rules, reveals clearly that Congress intended charging parties to enjoy the full status as parties, with attendant rights to seek review of adverse decisions, throughout the litigation of cases stemming from their charges with the Board:

(a) In Section 10(b) Congress made the charge by an injured party the jurisdictional prerequisite to the filing of the initial Board complaint;

(b) Under the Board's construction of the Act, it has

accorded the charging party the status of a full party litigant in proceedings before the Board.[2]

(c) The charging party is deemed a "person aggrieved" within the Congressional intent of Section 10(f), and thus entitled to invoke judicial review of final orders of the Board if the Board refuses any of the relief sought by the charging party. *Albrecht* v. *NLRB*, 181 F. 2d 652 (CA 7, 1950) and cases there cited;

(d) In Section 10(l) Congress granted to charging parties in district court injunction suits rights which are analogous to those granted them in formal Board proceedings. Section 10(l) expressly provides that the Board's petition for relief in the district court should be served "upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony." These rights are identical to those which the Board confers upon "parties" in its own Rules and Regulations and exceed those which are exercised by an *amicus;* they include the right to shape the record for review, to narrow issues, to offer contentious evidence, to make objections to argue orally, and, by necessary implication, to file briefs.[3]

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2. Section 102.8 of the Board's Rules and Regulations and Statements of Procedure, Series 8, as amended, defines those who shall be deemed a "party" before it and includes in that group ". . . any person filing a charge or petition under the act, . . ."

3. Section 102.38 entitled "Rights of parties", provides as follows:

> "Any party shall have the right to appear at such hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence, . . ."

Section 101.10, defining parties' rights in formal hearings, provides that:

> ". . . all parties to the proceeding, and the trial examiner have the power to call, examine, and cross-examine witnesses to introduce evidence into the record. They may also submit briefs, engage in oral argument, and submit proposed findings and conclusions to the trial examiner."

Accordingly, the fact that the Act is silent on the appellate rights of aggrieved charging parties in injunction suits under Section 10(l), whereas it makes express provision in Section 10(f) for their review of final Board orders, cannot imply a Congressional purpose to forbid such appellate review. *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission, supra; Consolidated Edison Company* v. *NLRB*, 305 U. S. 197; *Roberts* v. *NLRB*, 350 F. 2d 427 (CA. D. C., 1965). Rather, the described scheme of the Act, which repeatedly emphasizes the participatory rights of charging parties at all levels and stages of litigation stemming from their charges, implies a contrary Congressional purpose. Moreover, that statutory scheme has frequently led this Court, in other contexts, to recognize the existence of charging parties' appellate rights under the Act in the face of statutory silence, where the Board has not itself sought review. *United Automobile Workers* v. *Scofield, supra; International Union of Mine, Mill and Smelter Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U. S. 335; *United Steelworkers* v. *NLRB*, 376 U. S. 492.

Finally, Congress must be understood to have intended to confer party status, with an attendant right of judicial review, on charging parties in proceedings under Section 10(l) if the statute is not to be rendered anomalous. If Congress did not so intend, then it granted charging parties the right to participate in the district court shaping of the record for review without a right to seek review; similarly, charging parties would have been accorded full party status at all stages of the litigation before the Board itself, at all stages after the Board's final order (via Section 10(f) and *Scofield*), in the district court pursuant to the express terms of Section 10(l), but not in the Court of Appeals prior to a final Board order although their interests there and their need for relief are as great as they are at any of the other stages of the litigation.

There is no basis for inferring a Congressional purpose to create such legislative anomalies.

(3) The Decision Below Is in Conflict with This Court's Decision in United Automobile Workers v. Scofield (Fafnir Bearing Co.).

This Court's decision in *Scofield* argues for the fullest participation by charging parties in the appellate consideration of cases initiated by their charges. Although the precise question involved there related to the right of successful parties before the Board to intervene in review proceedings brought by others, the Court's rationale applies as well to cases under Section 10(l) involving the right to initiate review of adverse decisions damaging to the charging parties' vital interests.

The principal theoretical contribution of *Scofield* to the present issue is the proposition that the Act recognizes and enforces private rights of aggrieved parties, and not merely generalized "public rights." To the extent that a charging party's right to be free of unlawful boycotts is a private right enforced by the judicial process, it is inconsistent to deny the beneficiary of that right the opportunity to act independently to enforce it when the Board refuses to do so. There would be no point to recognizing the distinction between a public and a private right if the private beneficiary were not accorded a role separate from the Board in securing and protecting it. Nor would there exist any real purpose in drawing that distinction if the private beneficiary were not permitted to take all necessary judicial steps, including appeal, to obtain the relief to which the statute entitles him.

In its arguments to this Court in *Scofield* and *Fafnir*, the Board expressly contended that successful charging parties should have no *independent* role in the appellate considera-

tion of their cases because the Board has the exclusive authority to determine whether to enforce its orders, or to seek review, or to withdraw a case from a court of appeals, or to decline to seek certiorari from an adverse decision.[4] In rejecting the Board's contentions, this Court established the right of all aggrieved charging parties to act on their own behalf when the Board refuses to proceed notwithstanding its prior determination that a violation of law had been committed by a charged respondent. There is no sound conceptual basis for failing to apply these principles to charging parties' appeals under Section 10(l).

This Court's reference in *Scofield* to the Judicial Review Act, 5 U. S. C. §§ 1031-42, reinforces this conclusion. The latter statute, which purported to import the procedures of the National Labor Relations Act into the schemes of other Federal agencies, contains the following relevant provisions in § 1038:

> "The agency, and any party or parties in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto on their own motion and as of right, and be represented by counsel in any proceeding to review such order. . . ."
>
> "The Attorney General shall not dispose of or discontinue said proceeding to review over the objection of such party or intervenors aforesaid, but said intervenor or intervenors may *prosecute, defend, or continue said proceeding unaffected by the action or nonaction of the Attorney General therein.*" (Emphasis added.)

Since the rights conferred on charging parties in district court proceedings by Section 10(l) constitute them parties in litigation there, the right to "continue such proceeding"

4. Memorandum for the National Labor Relations Board, p. 3; Brief for the National Labor Relations Board, p. 27.

on appeal "unaffected by the action or non-action" of the Board would appear to be favored by this Court by analogy.

The court below, in failing to acknowledge that the charging party-petitioner had an independent—or private—interest to enforce, and by denying petitioner the means by which to enforce it in the absence of the Board's participation, violated the teaching of this Court in *Scofield* and *Fafnir*.

(4) By Denying Petitioner the Right to Judicial Review, the Court Below Infringed Due Process of Law.

Section 10(f) confers specific rights upon charging parties in proceedings in the district courts, including, as previously noted, rights to be present by counsel, to examine and cross-examine witnesses, to introduce relevant documentary evidence, to make objection to irrelevant or prejudicial testimony, to argue orally, to propose findings, and to file briefs.

The decision of the court below, denying petitioner standing to prosecute an appeal from an adverse district court decision, infringes due process of law by depriving petitioner of the opportunity to seek review of a decision stemming from a denial of these rights. Thus the protection of vested rights was there made dependent upon the fortuitous decision of the Board to seek review, an election over which the petitioner can exercise no control. Accordingly, the court below violated the established Constitutional principle that one whose vital interests are at stake in litigation has a right to be heard at every stage of the proceedings in which his rights are, or could be, protected. *Ashbacker* v. *FCC*, 326 U. S. 327. This right includes an opportunity to invoke appellate judicial review. *Griffin* v. *Illinois*, 351 U. S. 12; *Douglas* v. *California*, 372 U. S. 353.

Moreover, due process of law requires that an opportunity to exercise granted rights be afforded at all levels of the cause in which they are conferred. *Ashbacker* v. *FCC*, *supra*. The court below erred in assuming that the district court proceeding was a separate cause from the court of appeals proceeding seeking to review its decision. Thus the Tenth Circuit conceded the existence of exercisable rights on behalf of charging parties in the district court, which rights disappeared upon the rendering of the latter court's decision.

The error in such a view was recognized as long ago as this Court's decision in *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 175, in which Chief Justice Marshall stated:

> "It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create the cause."

The court below would foreclose all opportunity to "revise" and "correct" whenever the Board, for any undisclosed reason of its own, determines not to seek to do so.

(5) The Decision of the Court Below Creates a Conflict Among the Circuits Requiring Resolution by This Court.

The Tenth Circuit's dismissal of petitioner's appeal was predicated primarily upon the purported operation of the Norris-La Guardia Act, 29 U. S. C. A. § 107. This statute provides that "No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute . . ." with certain stated exceptions not here involved. While recognizing that Section 10(l) of the Labor Act constitutes an exception to Norris-La Guardia insofar as it permits *the Board* to institute suits for injunctive relief, the court below held that an appeal by charging parties of

a denial of injunctive relief is barred; such an appeal, held the court, is analogous to the institution of a petition for an injunction which may not be filed by private parties. In so holding the Tenth Circuit rejected petitioner's arguments (1) that an appeal is a continuation of a suit already instituted and not a new cause, as was stated by this Court in *Marbury* v. *Madison;* (2) that charging parties may support the Board's petitions for injunctive relief, so long as they rely solely on the facts, theories, and arguments of the Board, without such support constituting initiation of a cause; (3) that Norris-La Guardia constitutes a bar only to the institution of petitions for injunctive relief by private parties, not to their support of petitions already filed by the Board; and (4) in any case Section 10(h) of the Labor Act expressly exempts all proceedings under Section 10, including 10(l), therefore, from the operation of Norris-La Guardia.[5]

In rejecting these contentions the Tenth Circuit created a clear and absolute conflict with the views of the Ninth Circuit as expressed in *Retail Clerks Union, Local 137, et al.* v. *Food Employers Council, Inc.*, 351 F. 2d 525 (CA 9, 1965).[6] Indeed, the conclusions of the Ninth Circuit formed the basis for the arguments made by petitioner in the Tenth Circuit which the latter court rejected.

In *Retail Clerks*, pursuant to an appropriate charge filed with him and his investigation thereof, a Regional Director filed a petition in a District Court for a temporary injunc-

5. Section 10(h) provides, in pertinent part:

"When granting temporary relief or a restraining order . . . the jurisdiction of courts sitting in equity shall not be limited by the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes,' approved March 23, 1932 (U. S. C. Supp. VII, title 29, secs. 101-115)."

6. The *Retail Clerks* case was cited with approval by this Court at footnote 17 of its decision in *Scofield*.

tion under Section 10(l) to prevent a union from enforcing an alleged "hot cargo" agreement. Thereafter, instead of pursuing his pending petition for injunctive relief, the Regional Director executed a Stipulation with the offending union according to which the latter would cease its alleged unlawful conduct. The Regional Director filed this Stipulation in the District Court and sought its approval by that Court in lieu of an injunction. The charging parties objected to the approval of the Stipulation and urged the Court to grant injunctive relief pursuant to the Regional Director's pending petition.

The District Court in *Retail Clerks* recognized the charging parties' right to be heard on their objections to the Stipulation; after hearing the evidence, that Court granted the injunction as the charging parties requested and over the objection of the Regional Director. The union and the Regional Director then appealed from the order granting the injunction.

In his appeal the Regional Director argued that, since the Regional Director had determined to seek a remedy other than an injunction in the District Court, and since only the Regional Director may seek injunctive relief, therefore, the District Court's Order constituted the granting of injunctive relief at the request of private parties in violation of Norris-La Guardia and the policy of Section 10(l).

On appeal, the Ninth Circuit affirmed the District Court and dismissed the Regional Director's appellate arguments as lacking merit.

The Court held that Norris-La Guardia and the policy of the Act require only that the Regional Director must *initiate* suits for injunctive relief pursuant to the mandatory duty imposed upon him by Section 10(l) whenever he has reasonable cause to believe that one of the sections

enumerated therein has been violated. Once he has done so, the limitations of Norris-La Guardia and the policy of the Act cease to inhibit the charging parties' *right* to urge the granting of injunctive relief. So long as the urging of the charging parties is consistent with the theories and relief sought in the petition, they may actively *support* it despite any subsequent attempted change of position by the Regional Director. *The distinction between "initiate" and "support" is critical.* Accordingly, the Ninth Circuit held that District Courts may grant injunctions at the urging of Charging Parties and over the objection of the Regional Director, in cases under Section 10(l):

> ". . . where the charging parties did not petition the court independently or for relief different than that sought by the Regional Director, *but merely supported the original petition for injunctive relief requested by the Regional Director.*" (Emphasis added.)

The conflict between the Ninth and Tenth Circuit on the alleged applicability of Norris-La Guardia to efforts to "support" the Board's petition in the district or appellate courts is patent. This conflict requires the attention of this Court.

Moreover, the decision of the Fifth Circuit in *Houston Insulation Contractors Association* v. *N. L. R. B.*, 337 F. 2d 333 (CA5, 1964), represents a further apparent conflict with the decision of the Tenth Circuit on the breadth of the jurisdictional bar imposed by Norris-La Guardia. In the *Houston* case the Fifth Circuit granted a charging party's request for a stay of the Board's order over the objections both of the Board and a dissenting member who contended that the court, in effect, granted injunctive relief to a private party in contravention of Norris-La Guardia.

CONCLUSION.

For the foregoing reasons, it is urged that this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS,
Tenth Circuit.

March, 1969, Term

Filed United States Court of Appeals, Tenth Circuit, May 15, 1969. William L. Whittaker, Clerk.

SEARS, ROEBUCK AND CO., CHARGING PARTY AND COMPLAINANT BEFORE THE NATIONAL LABOR RELATIONS BOARD,
Appellant,
vs.
CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO,
Respondent-Appellee,
CLYDE F. WAERS, Regional Director of the Twenty-Seventh Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,
Petitioner-Appellee.

No. 6-69.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

Gerald C. Smetana, Chicago, Illinois (Donald L. Giacomini, Denver, Colorado, and Kalvin M. Grove, Chicago, Illinois, on the brief) for Appellant;

Philip Hornbein, Jr., Denver, Colorado, for Respondent-Appellee;

Julius G. Serot, Assistant General Counsel, Washington, D.C. (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, and Marvin Roth, Attorney, Washington, D. C., on the brief) for Petitioner-Appellee.

Before MURRAH, *Chief Judge*, and LEWIS and HILL, *United States Circuit Judges*.

HILL, *Circuit Judge*.

This is an appeal by Sears, Roebuck and Company, the charging party and complainant before the N. L. R. B., from an order of the district court dismissing the petition of the Regional Director for a preliminary injunction under section 10(l) of the National Labor Relations Act, as amended, 29 U. S. C. § 160(l). The Regional Director did not appeal from the denial of the injunction and asserts that consequently this court does not have jurisdiction to consider the merits of the matter because Sears lacks the necessary standing to prosecute this appeal.

Sears originally filed a charge with the Board alleging that the Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, was picketing Sears in furtherance of a dispute with Joe and Eddie's Carpet Service, a firm employed to install floor coverings sold by Sears. After investigating the charge, the Regional Director concluded that there was reasonable cause to believe that the Union was engaged in picketing in violation of section 8(b)(4)(i)(ii)(B) of the Act, and that a Board complaint based on that charge should be issued. Pursuant to the mandate of § 10(l), the Regional Director then filed a petition for an injunction with the district court pending final disposition of the complaint

before the Board. As the charging party, Sears was notified, in accordance with the provisions of § 10(l), of the filing of the petition and the time and place of the hearing to be held by the district court. At that hearing the party litigants, the Board and the Union, presented evidence to support their contrary positions on the unlawful picketing issue underlying the Board's quest for an injunction. Sears put in an official appearance but did not participate in any meaningful fashion. The court considered the various contentions of the parties and concluded that the Board had failed to sustain a case for injunctive relief. The Regional Director decided to accept the judgment of the court but Sears disagreed and instituted this appeal.

The Board takes the position that Sears was not a party to the § 10(l) court proceeding and cannot appeal therefrom. This is said to follow from the fact that § 10(l) merely provides that the charging party "shall be given an opportunity to appear by counsel and present any relevant testimony." It is argued that to expand that grant of limited participation into a full scale right to appeal when the Board declines to do so, would be not only to ignore the plain meaning of the statutory language, but would constitute a total disregard for the overall scheme of labor injunction treatment embodied in the N. L. R. A. and the Norris-La Guardia Act.

Sears counters by stressing that § 10(l) is an exception to the general prohibition against labor injunctions, which to be fully understood requires that a distinction be made between "institution" of an injunction proceeding and "subsequent acts in support thereof." Sears claims that Norris-La Guardia is concerned only with the institution of such petitions and that once the Board has filed the petition pursuant to § 10(l),[1] Norris-La Guardia no longer

1. Section 10(h) exempts section 10 proceedings from the operation of Norris-La Guardia. Hence, when the Board invokes § 10(l) the district court has jurisdiction.

operates as a barrier. Thus § 10(l) should be interpreted as granting charging parties all the rights of full juridical parties, including the right to appeal. We cannot agree and must conclude that Sears lacks the necessary standing to undertake this appeal.

It is not necessary to repeat the history of abuses that prompted the Norris-La Guardia Act, nor to belabor the public policy formulated therein. The language of that Act clearly indicated that "Congress was intent upon taking the federal courts out of the labor injunction business . . ." *Marine Cooks & Stewards* v. *Panama S. S. Co.*, 362 U. S. 365, 369 (1960). Accordingly, when an exception to that Act, such as is here involved, is relied upon to support the jurisdiction of the court; the language employed to articulate that exception will not be given any more expansive an interpretation than is clearly warranted.[2] Viewed in that context, the limited rights conferred upon a charging party in a § 10(l) proceeding, the right "to appear by counsel and present any relevant testimony," must be taken to mean just that, no more and no less. To read into that restricted right of participation, the right to initiate appeals, a right traditionally available only to full party litigants, would not only violate every sound principle of statutory construction, but would require a complete disregard for the sensitivity of the labor injunction problem.

Section 10(l), and its counterpart § 10(j), were designed to provide temporary injunctive relief pending the final adjudication of the Board. The temporary relief is allowed only upon the filing of a petition by the Regional Director. It is his view of the facts and law that the district court is to consider. "The courts are not free to roam at will over every aspect of a labor dispute upon the request of the

2. The Supreme Court has repeatedly cautioned against judicial dilution of Norris-La Guardia, *e.g.*, *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195 (1962); *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91 (1940).

charging party. * * * [T]he principal role in these proceedings is to be played by the Regional Director acting in the public interest, and while the charging party is free to aid him in the course of the litigation, the charging party may not substitute itself as the principal complainant." *McLeod* v. *Business Machine & Office App. Mech. Conf. Bd.*, 300 F. 2d 237, 243 (2d Cir. 1962). When the Board declines to appeal an adverse district court decision, the charging party may not initiate an appeal, for then the charging party would become the principal complainant, in defiance of the scheme of the Act to the contrary.

The cases relied upon by Sears, namely, *Automobile Workers* v. *Scofield*, 382 U. S. 205 (1965) and *Retail Clerks Union* v. *Food Employers Council, Inc.*, 351 F. 2d 525 (9th Cir. 1965), are distinguishable and of limited assistance here. In Scofield the Court held that both the successful charging party and the successful charged party have a right to intervene in the court of appeals proceeding reviewing a final Board order. Section 10(f) of the Act expressly provides for the right of an aggrieved party to obtain judicial review, the Court determined that "Congress would not intend, without clearly expressing a view to the contrary, that a party should suffer by his own success before an agency." 382 U. S. at 216. No plausible theory has been advanced to justify extending the reasoning of Scofield to the totally unrelated issue presented here. Sections 10(l) and 10(f) deal with completely different situations. The temporary injunctive relief provided by § 10(l) does not contain elements of multiplicity of appeals or stare decisis that concerned the Court in its consideration of the § 10(f) question.

In Retail Clerks the court reviewed the action of a district court that had granted a temporary injunction after the Board had attempted to withdraw a § 10(l) petition. In upholding the right to grant an injunction after consid-

ering evidence introduced by the charging party, the court observed that to do otherwise "would make the district court's action a mere rubber stamp for the Regional Director." 351 F. 2d at 530. The precise holding of the case thus relates to the conduct of § 10(l) petitions in the district court and can have no direct bearing upon the right to appeal at issue here. Moreover, any implications to the contrary that might be drawn from the decision, are completely dispelled by the fact that the court denied the request of the charging party to intervene at the appellate level. If the court had intended to accord charging parties equal status with full party litigants, there would have been no need to intervene and certainly no justification for requiring the parties to appear as amici curiae.

In sum, we conclude that to grant a charging party the right to appeal, a right ordinarily reserved to party litigants, would constitute an unwarranted expansion of the more limited rights conferred by the express language of § 10(l). Such an expansion, if there is to be one, must originate from other sources.

Sears urges in the alternative, that if the contention that it is already a party in the § 10(l) proceedings is rejected, then permission should be granted to allow it to intervene in order to prosecute this appeal. What has been said with regard to the right to appeal as a party, applies with equal force to the assertion of a right to appeal as an intervenor. Section 10(l) confers specific limited rights upon a charging party. The right to initiate an appeal is not one of them. What cannot be obtained directly by asserting a right to appeal as a party, cannot be obtained indirectly through intervention. Cf. *Reynolds* v. *Marlene Industries Corp.*, 250 F. Supp. 722 (S. D. N. Y. 1966).

APPEAL DISMISSED.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
For the District of Colorado.

CLYDE F. WAERS, Regional Director of the Twenty-Seventh Region of the National Labor Relations Board, for and on behalf of THE NATIONAL LABOR RELATIONS BOARD, *Petitioner*, vs. CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO, *Respondent*.	Civil Action No. C-1052.

(Filed United States District Court, Denver, Colorado, Oct. 4, 1968. G. Walter Bowman, Clerk.)

REPORTER'S TRANSCRIPT.

BE IT REMEMBERED, that the above-entitled matter came on for hearing before The Honorable William E. Doyle, Judge, presiding, Courtroom D, U. S. Court House, Denver, Colorado, at or about the hour of 3:00 o'clock p.m. Friday, September 27, 1968.

Appearances:

J. Richard Wise, Esq., Attorney at Law, National Labor Relations Board, 260 New Custom House, Denver, Colorado; and

[2] Francis Sperandeo, Esq., Attorney at Law, National Labor Relations Board, 260 New Custom House, Denver Colorado; and

W. Bruce Gillis, Esq., Attorney at Law, National Labor Relations Board, 260 New Custom House, Denver, Colorado; on behalf of Petitioner.

Donald L. Giacomini, Esq., Attorney at Law, Security Life Building, Denver, Colorado, appearing on behalf of Sears Roebuck & Co.

Philip Hornbein, Jr., Esq., Attorney at Law, 2007 Security Life Building, Denver, Colorado, appearing on behalf of Respondent.

Whereupon, the following proceedings were had, to wit:

[3] Proceedings.

The Court: I asked you to come in today so that I could give you my views of the case. Because, I think there is some urgency about it from the standpoint of both sides. I just received the last memorandum a couple of days ago. I have been buried in trials and other work. So I thought it would be helpful to both of you if I were to just, the best I can, give you my expression as to how I feel about it.

This is an action in which the plaintiff, Waers, Regional Director of the Twenty-seventh Region of the National Labor Relations Board, on behalf of the National Labor Relations Board, seeks injunctive relief against the Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, charging that the respondent has been guilty of an unfair labor practice and that it has been picketing the Sears, Roebuck outlets; Cherry Creek and on West Sixth Avenue.

It is alleged that Joe and Eddie's Carpet Service, a partnership, engaged in the business of carpet installation; that that company—that association—together with others who are mentioned in the Complaint furnished service to

Sears. The allegation is that in essence these installers are in a relationship of independent con- [4] tractors to Sears and, thus, the organization's efforts on the part of the respondent are a violation of Section 8(b)(4) of the National Labor Relations Act.

We heard evidence in the matter, which was a question of fact, basically.

I find and determine that the Court has jurisdiction over the case. I note in passing that at the conclusion of the evidentiary hearing, that I made certain findings, and I might run over them now.

At that time I said, "It appears to me that it's not an ordinary employee relationship; that Sears does, however, contract the whole job; that is, the carpeting or floor covering, plus the services. And, carrigs the responsibility of seeing to it that the job is satisfactory, because it is a Sears customer. It does not appear, however, that the employee is subject to regular hours; doesn't appear that he gets any of the fringe benefits that other employees get, such as health and welfare benefits and perhaps a pension; the profit sharing; and some other things that were described that are available to ordinary commissioned or salaried employees at Sears, Roebuck."

The evidence showed that each of them was eligible, on a one day discount pass, whereby they could buy merchandise for ten percent off.

I went on to say: "On the other hand, it does [5] seem to me that Sears has a vital interest in the price of this from what has been presented here because they want to compete in the community. Perhaps more than that, they wish to be able to keep their prices below those of other concerns. And so, this is evident from the fact and the testimony that they have recently found that their margin

of profit was nil because the service was eating it all up. So, they insisted on having a $1.35 rate per yard."

And then I said: "Is that right?" And Mr. Wise answered: "Yes."

The evidence shows, as I recall it, that the overall price had been $1.65, and the installers were paying some of the extra expenses such as moving furniture and taking up old carpeting. And, that Sears then negotiated this lower rate.

I then went on to say: "And these facts are pretty well established and undisputed. On the other hand, these fellows appear to be entrepreneurs in some degree because they can take up their work. As I say, they don't get the other benefits that Sears offers its employees, although they get a ten percent discount on request and application. Isn't that right? Mr. Wise: Yes, sir."

Then I said, "So under these circumstances, I guess the matters are really conclusions of law more than they are findings of fact, aren't they?" And, it was mentioned [6] that the installers are ultimately responsible for guaranteeing their workmanship and certainly this is true. And, Mr. Wise said: "The contract does state the installers are responsible for guaranteeing their workmanship and so on and have to pay for any damages which would not make Sears entirely responsible." And I say, "They have to indemnify Sears. For bad workmanship." For example.

I go on to say: "Sears continues to bear the responsibility so far as the customer is concerned. Mr. Wise: I think this is because of the economic factors."

Then I say, "Also Sears is responsible for collecting. The testimony is undisputed that these contractors have nothing whatsoever to do with collecting from the purchaser. Sears does this through its machinery; its credit plan or

system. And, if there is a loss as a result of a bad debt or bankruptcy, why, Sears bears the risk of the loss."

I might also add that the relationship arises as a result of the printed contract between Sears and the installer. It doesn't say that here, but I say it. It's prepared by Sears. It sets forth the various stipulations between it and the installer.

All right. It's a very interesting question as to whether—as to the basis for Board action or for a holding of unfair labor practice, but my view is that it's [7] not—that there is no probability even that the Board will so find. Section 8(b)(4)(A) or Section 8(b)(4)(B), under the 1959 amendment is designed to protect innocent third parties, as I see it, from economic loss as a result of a labor dispute in which they have no concern. This was mentioned in NLRB against Brotherhood of Carpenters and Joiners, 184 F. 2d, p. 60. There are a couple of District of Columbia cases that I think are pertinent. One is Local Union No. 24 of the Teamsters against NLRB, 266 F. 2d 675 at p. 680. This was in the D. C. Circuit, 1959, wherein the court says: "Arrangements of the type here disclosed must be scrutinized by the Board with great care because of the danger that they may be used by the real parties in interest as a device to achieve insulation from union activity." Citing cases. And, citing Local No. 24, Teamsters against National Labor Relations Board, 105 U. S. Appeals, D. C. 271, 276; 266 F. 2d 675, 680 (1959).

And, it goes on: "Of course, in an area so wide as is the field of Labor Relations, there are many situations in which the answer to a dispute under 8(b)(4)(B) is easily derived by the application of such legalistic formulae as 'independent contractors, co-employers, or allies'. But it is equally clear that there is a zone of dispute in which such formulae are useless, and the answer must be derived

by applying the intent of the statute to the facts [8] in the case.

"The inquiry in the present case was limited to whether Todaro was an 'independent contractor'. We think it clear, however, that Todaro's relationship to Terminal was in the 'zone of dispute in which such formulae are useless' and that 'applying the intent of the statute to the facts in the case' required consideration of such facts as, for example, the history of Todaro's relationship to Terminal; the conduct of his cleaning business and its relationship to Terminal's business; the Terminal's influence on, if not control over, Todaro's labor policy. In our view, these facts make inescapable the conclusion that Terminal was not a neutral within the meaning of the statute."

So the question should be whether the respondent is neutral. I'm not sure. I'm convinced that a categorical approach to this in terms of common law relationship is not the proper approach, since this is an effort to charge and convict the respondent of an unfair labor practice which in essence is a secondary boycott. The other side of this is that a person boycotted must be someone who is wholly secondary and lacking interest in the controversy; someone who is an innocent bystander, so to speak. And I do not see—looking at the facts here, it's plain to me that the relationship is not that of employer-employee, but at the same time I think that it is somewhat a legalistic relation- [9] ship; an arrangement. And, that a real effort has been made to see to it that it looks like an independent contractor relationship.

The Board itself in a case that is quite similar to this reached the same conclusion that I reach. I refer to Local No. 2265 against Carpet Center, Inc., Case No. 7-CC-397, in which the facts are quite similar.

I would say this; that this one was somewhat stronger

than the case at bar in that there was a closer relationship between the petitioner and the carpet layers. But, in the course of the trial, the examiner went on the ground that this was in substance, in reality, an employee relationship.

I do not think that I have to so find. I think that it's sufficient to find and determine and hold as I do that Sears is vitally interested in the price—in the installation price. The installation price was the big element in the total price that was charged the customer. And so, it was vitally interested in whether or not the installers were members of the respondent union. They were not strangers. They were not innocent neutrals. And consequently, I do not see that this case is one for the issuance of injunction, which is extraordinary relief, even though it is statutory. I agree it is. I see little probability that when this matter comes before the Board that [10] the relief that is sought will be granted.

That being the case, I do not think that the petitioner makes out a case for temporary injunctive relief here.

So, the request of the petitioner will be denied and the Complaint will be dismissed and the cause of action will be dismissed. This is a final judgment.

APPENDIX C.

176 NLRB No. 120 D-2074

Denver, Colo.

UNITED STATES OF AMERICA,
BEFORE THE NATIONAL LABOR RELATIONS BOARD.

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO, and SEARS, ROEBUCK AND CO.	Case 27-CC-278.

DECISION AND ORDER

On February 6, 1969, Trial Examiner Maurice M. Miller issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom, and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision with a supporting brief, the General Counsel filed an answering brief, and the Charging Party filed an answering brief and cross-exceptions with a supporting brief.

Pursuant to the provisions of Section 3(b) of the Na

tional Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, cross-exceptions, and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following clarification.[1]

We agree with the Trial Examiner's findings, based on the application of the "right to control" test to the particular facts of this case, that the floor covering installers involved herein, who perform services for Sears, Roebuck and Co., are independent contractors. Further, we agree that there is no basis for finding Sears to be an "ally" of the contractors in their dispute with the Respondent.

As more fully set forth by the Trial Examiner, all of the installations are accomplished by separate enterprises, which have other customers in the Denver area. These businesses are operated from the homes of their owners, who perform no work on the Sears' premises. They operate with their own business trucks, tools, materials, bank accounts and liability insurance, and they wear no Sears' uniforms of any kind. The installers are responsible to repair any of their work which is defective and to pay for any damage. The installation enterprises set their own daily work limitations and schedules and on occasion several have subcontracted Sears' jobs without prior approval or knowledge of Sears. Although the contracts

[1] The Respondent's request for oral argument is hereby denied as, in our opinion, the record, including the exceptions, cross-exceptions and briefs, adequately presents the issues and the positions of the parties.

between Sears and the installers call upon the contractor to refrain from doing extra work for Sears' customers without written authorization, the practice is clearly to the contrary. Unlike Sears' employees, the installers' relationship with the company is not governed by the personnel manual, nor do they have to take the physical examination required of all Sears' employees, and none of the contractors or their employees receive any employee benefits from Sears, except an occasional 1-day discount which is also available to police and firemen, among others. Those installers who perform services with their own employees pay such assistants at rates fixed solely by them and deduct from their wages all necessary items such as social security and taxes. On the other hand, the contractors are paid by Sears without any such deductions.

Contrary to the Respondent's contention, the facts of this case are clearly distinguishable from those in *Carpet Center*.[2] Unlike the particular indicia of control retained by the retail carpet dealer in that case, the record here shows that the installers can and do schedule work for other customers on the days they work for Sears and they determine the order of performance. Furthermore, Jose and Eddie's Carpet Service, one of the installers herein, reschedules work by arrangement with Sears' customers without notifying Sears. None of the installers are supplied with precut or presewn material, or with instructions on how to get to a customer's premises. The contractors need not report to Sears daily or at any given time, and assignment of work is not based on where the installers live. Although the contractors are presumably required to give Sears notice whenever they will be unavailable for work because of vacations, sickness, or for some other

[2] *Local No. 2265, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Carpet Center, Inc.)*, 170 NLRB No. 93

reason, there is some record evidence that such notices are not given. The price lists which were arrived at through negotiations between Sears and the installers reflect the fact that the contractors are paid according to the difficulty of the work, instead of a single rate per square yard. The installers can and do change the prices set forth on work orders if for any reason they do not accurately reflect the actual work performed. Generally the installers are supplied with a room layout showing the areas to be covered and on occasion the seams to be sewn; however, they may and do disregard said layouts if they believe they can perform the job in a more satisfactory manner. Furthermore, if in their judgment a job cannot be completed satisfactorily the installers can and do reject the assignment.[3]

From the foregoing, it is apparent that the Sears' installers clearly have a far greater scope of decision-making power than those in *Carpet Center* and *Arnold's Carpet* and are independent contractors.

Having found that the installers are independent contractors and that Sears is not sufficiently related to the contractors to destroy its neutrality, we adopt the Trial Examiner's further findings that Respondent violated Section 8(b)(4)(i)(ii)(B) of the Act by picketing Sears, with an unlawful object of forcing Sears to cease doing business with the installers, including Joe and Eddie's Carpet Service, with whom the Respondent had a dispute.

3. The instant case is also distinguishable from the recent decision in *Carpet, Linoleum and Soft Tile Layers Local No. 1238 (Arnold's Carpet)*, 175 NLRB No. 50, in that here there is substantial record evidence that the installers can and do exercise independent judgment over the manner of cutting and piecing together the carpet. We also note that whereas the installer in *Arnold's Carpet* received weekly payments, the Sears contractors may be paid by the job or whenever they desire.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C., June 20, 1969.

FRANK W. MCCULLOCH,
Chairman,

GERALD A. BROWN,
Member,

SAM ZAGORIA,
Member,

(SEAL) *National Labor Relations Board.*

APPENDIX D

TXD-(SF)-13-69
Denver, Colo.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Trial Examiners
Branch Office
San Francisco, California

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION No. 419, AFL-CIO, and SEARS ROEBUCK AND CO.	Case No. 27-CC-278

Mr. Richard J. Wise, Denver, Colo.,
for the General Counsel.
Mr. Philip Hornbein, Jr., Denver, Colo.,
for Respondent Union.
Lederer, Barnhill and Fox, by
Mr. Kalvin M. Grove, Chicago, Ill.,
for Complainant Company.

DECISION OF THE TRIAL EXAMINER

STATEMENT OF THE CASE

Maurice M. Miller, Trial Examiner: Upon a charge filed and duly served, the General Counsel of the National Labor Relations Board caused a Complaint and Notice of Hearing to be issued and served upon the parties herein.

(The Complainant, Sears, Roebuck and Co. had filed the charge on August 9, 1968; General Counsel's Complaint issued August 29th. All dates cited within this decision refer to 1968, unless otherwise noted.)

Flooring Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, designated as Respondent Union herein, was charged with the commission of certain unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A)(B)(3)(B) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519. Copies of the Complaint and Notice of Hearing were duly served upon the respondent labor organization. Within Respondent Union's duly filed answer, certain factual statements in General Counsel's Complaint are conceded. Respondent Union, however, denies the commission of unfair labor practices.

Pursuant to notice, a hearing with respect to the issues was held at Denver, Colorado, between October 8th and October 11th, before me. The General Counsel, Respondent Union, and Complainant were represented by counsel. Each party was afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues.

At the time before the hearing closed, Respondent Union's counsel requested a subpoena be issued

Counsel's witness, Massey, who had previously been excused following the completion of his testimony, counsel then proposed his recall as Respondent Union's witness. While testifying first, in General Counsel's behalf, Massey had proffered certain testimony which a subsequent witness for General Counsel, Harris, partially contradicted. Respondent Union's counsel contended that Massey's further testimony with respect to the particular matters involved thus in contradiction regardless of whether he maintained a disagreement with General Counsel's subsequent witness or resolved their clearly discrepant testimonial recollections would be both relevant and material. The following day, when the parties' testimonial presentations were, in all other respects, complete, the witness sought by Respondent Union's counsel had, presumptively, not been served; he did not present himself when called. Respondent Union's counsel, then, requested that the record be kept open and the hearing continued, so that Massey's further testimony, regarding the discrepancy between Harris' recollection and his, could be received at some later date. Following a recess colloquy, I concluded that such further testimony, depending upon its conceivable tenor, would either be immaterial or merely cumulative. Counsel's request that the record be kept open and the hearing continued, therefore, was denied. Upon further consideration, I remain persuaded still that the disposition of counsel's request has worked no prejudice, with respect to Respondent Union's defensive presentation. *N.L.R.B. v. Thurston Instrument and Electronic Company*, 344 F. 2d 863, 59 LRRM 2175, 2176 (C.A. 9). My ruling is reconfirmed.

Since the hearing's close, comprehensive and well prepared briefs have been received from counsel for the General Counsel and Complainant. These have been duly considered

Findings of Fact

Upon the entire testimonial record, documentary and film evidence received, and my observation of the witnesses, I make the following findings of fact.

I. Jurisdiction

Sears, a New York corporation, maintains several retail mercantile establishments both within and near Denver, Colorado, at five locations. Three of these are retail stores.

(Customarily, these are designated as the Cherry Creek store, Westland store, and Northglenn store, respectively.)

Upon them, likewise, maintains a warehouse, with a separate catalogue service location. Respondent Union's course of conduct, challenged herein as violative of the statute, affected Complainant's Cherry Creek store and warehouse merely.

In the course and conduct of its business operations, Sears has sold and distributed through its Cherry Creek store specifically goods and products valued in excess of $[illegible],000 yearly. Likewise, Sears has purchased, transferred and delivered to its designated store, and warehouse, goods and materials valued in excess of $[illegible] yearly, which goods and materials were transported to Complainant's store and warehouse directly from states of the United States other than the State of Colorado.

Upon these facts, which are conceded to be correct, I find that Complainant is now, and has been throughout the period with which this case is concerned, an employer within the meaning of Section 2(2) of the Act, engaged in commerce and business activities wholly affect commerce within the meaning of Section 2(6) and (7) of the statute.

With due regard for those jurisdictional standards which the Board presently applies (see *Stevens Mailing Service*, 122 NLRB 81, 43 LRRM 1056, and related cases), I find assertion of the Board's jurisdiction in this case warranted and necessary to effectuate statutory objectives.

II The Respondent Union

Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, designated as "Respondent Union" within this decision, is, concededly, a labor organization within the meaning of Section 2(5) of the Act, as amended. Throughout the period with which this case is concerned, I find, George Cooney, Respondent Union's financial secretary and business manager, together with Paul Wishard and Richard Geisler, field representatives, have been agents of the designated respondent, functioning on its behalf, within the meaning of Section 2(13) of the Act, as amended.

III The Unfair Labor Practices

A *Issues*

In connection with Sears' general mercantile operations, the firm sells floor coverings at retail. The floor coverings sold comprise soft surface (carpet), together with hard surface (linoleum and tile), materials. In most cases, the firm sells not only the floor covering materials but likewise, whatever installation services may be required. The customer pays a single price, calculated to cover Sears' selling price for necessary materials purchased together with a labor selling price, plus any charges related to credit terms which the particular customer may request or require. Whenever Sears' floor covering sales compass installation work, responsible Sears representatives finally "assign" such work to various floor covering installers, under circumstances which will be noted.

This case derives from a series of picket line confrontations between representatives of Respondent Union, on the one hand, and, on the other, Joe Brase and Eddie Stimac, doing business as Joe and Eddie's Carpet Service Company, together with Sears, through its Cherry Creek store and warehouse specifically. Thereby, so General Counsel contends, the Respondent Union, through its representatives, induced and encouraged various Sears employees together with individuals working for other persons engaged in commerce to cease performing services for their respective employers. Further, General Counsel contends that Respondent Union likewise threatened, coerced, and restrained Sears, together with other persons engaged in commerce. Such conduct was undertaken—so General Counsel herein charges—with the unlawful object, in each case, of forcing or requiring Sears to cease doing business with Joe and Eddie's Carpet Service, and certain other floor covering installers variously designated. Respondent Union denies the statutory violations charged. Further, Respondent Union contends, affirmatively, that all floor covering installers working on Sears' jobs function as company workmen; that Sears fixes and controls their wages and working conditions; that those wages and working conditions are inferior to those generally prevailing throughout the floor covering industry within the Denver metropolitan area; that such wages and working conditions, therefore, jeopardize the prevailing standards for wages, hours, and working conditions set through collective bargaining for Respondent Union's members; that Respondent Union thus has a so-called primary labor dispute with Sears concerning the wages, hours, and working conditions which Complainant has fixed for floor covering installation workers; that Sears is not a neutral or disinterested party with respect to that dispute; and that Respondent Union's conduct, challenged herein as violative of law, should, there-

fore, be considered protected and concerted activity, on both statutory and constitutional grounds.

B. *Facts.*

1. Preliminary Statement.

How Floor Covering Is Sold.

At Sears' metropolitan Denver area stores, the specific department or division which handles floor covering sales is known as Division 37; such departments or divisions are maintained at the Cherry Creek, Westland, and North glenn stores.

Generally, prospective customers visit the floor covering department of some Sears store; there, they may discuss with a salesman preliminary the type of floor covering they presumptively desire to purchase. The salesman, usually, tries to arrange a visit within the customer's home; when successful, he brings samples calculated to help the customer select whatever floor covering he may desire. Should the customer indicate that a complete job, with installation service, is desired, the salesman will prepare a Floor Covering Estimate and Proposal document; having seen the specific floor area or areas which the customer wishes covered, the salesman will calculate both the price of the carpet or hard surface covering materials required, and estimated material installation charges. Both figures will be noted, within appropriate spaces, on Complainant's Estimate and Proposal form (Six copies of the proposal are normally prepared. The copy titles vary from one copy to another; they correspond with the first copy, however, in most major respects.)

When the customer accepts his so-called "final" proposal for both materials and labor, the salesman will normally

draw a diagram of the space or spaces to be covered, within a graph marked A section which the firm's Estimate and Proposal form provides. This drawing will show the rooms to be covered, the type of material required, and sometimes where seams should be sewn or laid.

Following the document's preparation, when a final consensus with the customer regarding various details, such as credit terms, has been reached, the complete Estimate and Proposal is signed, in multiple copies, by the parties. The salesman then retains the document, minus the customer's copy, together with a sales check, to Sears' store. The reverse side of the customer's retained copy of the proposal form, on the record shown, contains the following language:

> Instructions: It is understood that Sears will not install said materials but that by the acceptance of this proposal you authorize Sears to arrange with a contractor licensed where required to make the installation, you authorize Sears (1) to make to said contractor an installation work order with these specifications, (2) to inspect the installation upon completion thereof, and (3) to pay the contractor his charges for such installation upon our execution of a completion certificate establishing that the installation has been satisfactorily completed. You agree to pay to Sears the amount specified in said which will cover the price of said materials and the installation charges.

When the customer has proposed a credit purchase, the complete Estimate and Proposal is submitted to Sears' credit department for review. Likewise, if the customer's credit terms must be approved, the proposal is submitted to the proper [illegible] Manager. The latter, then, checks the document's correctness.

When the particular Estimate and Proposal has received the [illegible] Manager's approval, the necessary [illegible] copies [illegible] and [illegible] are placed in a sub-

folder, which is normally sent to Sears warehouse installation department, or some particular store's customer service department, for further processing.

(With respect to hard surface floor coverings—linoleum and tile—such processing is centralized at Sears' warehouse, under Installation Manager Donald Chandler's supervision. Chandler is responsible, likewise, for the processing of carpet installation orders received from Sears' Cherry Creek store. Sears' other store Division Managers, McNally at Westland and Meyers at Northglenn, are responsible for processing carpet installation orders which originate at their stores.)

The store salesman generally next places an order for whatever materials may be required. Carpet is procured, generally, from direct sources—that is, the carpet mills—or from Sears' [and stock warehouses. Linoleum and tile are normally carried in stock at the warehouse.

Following a sale's conclusion, the salesman generally gives the customer an approximate period within which the material may be expected, and notes (three or four days thereafter) as the customer's estimated installation date. Normally, when the goods required have been made available either from Sears' warehouse or from some direct source—whether hard surface or soft surface materials are involved—the job folder connected with the particular sale will be received from a file for further handling, by a representative in Sears' warehouse, or store customer service department.

[For present purposes, this description of Sears' procedures related to handling floor covering job orders will be rather generalized. The process will be detailed further, later, when the nature of the relationship between the Chandler unit and various floor covering retailers must be considered.]

Sears' installation department or customer service representative, first, communicates with the designated customer, to determine the best, most appropriate time for material installation, consistent with both the customer's needs and the projected availability of required installers. When this determination has been made, the necessary installation work is assigned to some particular installer. Requisite copies of Sears' job documents designated "General Order to the Contractor" specifically are replaced in the job folder which the installer will subsequently procure; these folders are, then, placed, within properly designated boxes or slots, depending on the store, for each installer's subsequent pickup.

(The Complainant maintains current working relationships with some sixty installers; this number includes those who perform floor covering work. At Sears' warehouse, each of them has a pigeonhole within which their particular job orders are placed. At Westland, such job orders are made available within the store's customer service department.)

Most installers, generally visit the warehouse or particular store within which they do business, daily; at such times, they will customarily pick up their work orders. They then procure the material required for the job which they will be required to perform on any given day, proceed to the jobsite, and perform whatever work may be required.

When their particular jobs are completed, the installers concerned pursuant to their more or less regular practice submit one copy of Complainant's relevant Estimate and Proposal, together with their conventional invoice form, for payment.

Hard surface floor coverings — linoleum and tile — which Sears sells is normally installed by Frank Harris, doing business as Frank Harris Tile Company, and by Daryl

Massey, doing business as Duke's Floor Covering; other linoleum and tile installers who sometimes receive work from Complainant herein, however, include Joseph Mozzicato, John Erpelding, doing business as Sea-Ro Tile Company, and Gerald Fiduert, doing business as G. & H. Tile Company. Soft surface floor covering sold from Sears' Westland store has been installed by Joe and Eddie's Carpet Service Company. Before Respondent Union commenced the picketing with which this case is concerned, soft surface coverings sold through Cherry Creek were installed by Crowe Carpet Service; since Respondent Union began picketing, however, Cherry Creek installations have been handled by Joe and Eddie's and by Paul E. Clark, d b a Clark Carpet Service. So far as the record shows, these constitute the full complement of floor covering installers working out of Sears' warehouse and Cherry Creek store.

Respondent Union's Picket Line.

Sometime in July, 1968, Joe Brase and Eddie Stimac, together with a worker in their hire, Charles Duran, went to a Sears customer's home to perform a repair job. When they reached the customer's residence, Respondent Union's field representative, Wishard, appeared. Brase and he had a conversation.

(Stimac, who was present, testified that the conversation occurred in July. Brase—likewise, first recalled the event as occurring in July, but — during cross-examination — testified that it occurred in the middle of May. Upon this record, I am satisfied that the testimony preponderantly warrants a determination that the conversation took place in July, consistently with Stimac's testimony and Brase's first recollection.)

Wishard asked whether Stimac and Brase would consider joining the Union. Brase, however, responded negatively,

declaring that they were partners and would be unable to maintain their partnership — consistently with their understanding of Respondent Union's relevant rules — unless they had two or more employees. Wishard then left, but returned shortly thereafter. About fifteen minutes later, Field Representative Geisler joined him, bringing some picket signs. Wishard, then, requested Brase to state what his "outfit" was called. Brase replied that he could not do so; Wishard, however, declared that his, (Brase's), name was known. Respondent Union's field representative then printed the name "Joe Brase" within blank spaces on the picket signs which Geisler had brought; both men commenced picketing. Joe and Eddie's repair job took approximately 45 minutes to complete; within that period, Wishard and Geisler carried their picket signs on the sidewalk, before the customer's home, for approximately thirty minutes.

> (Respondent Union, through its counsel, has conceded that a picket sign was carried near the customer's residence. Counsel declared, however, that the sign which was carried contained the name "Sears, Roebuck and Co." but did not contain Brase's name, that of his partner, or their partnership designation. Respondent Union has produced no testimonial support for its counsel's declaration regarding the business enterprise designated; neither Wishard nor Giesler was called to testify. Brase's testimony regarding the picket sign's language, therefore, stands without record contradiction; that testimony is credited.)

When their job was completed, Brase, Stimac, and Duran went to a nearby coffee shop. They were joined, there, by Wishard and Giesler; Wishard renewed their earlier conversation. He declared that Joe and Eddie's Carpet Service was rumored to be doing Sears' work, that they were non-union, that Respondent Union did not like it, and that

"they" wanted Duran and both partners to join. He also reported that Putsche of Crown Carpet Service had complained, and that "they" had to "take care of" the boys. Brase, Stimac and Duran, however, joined in telling Wishard that they were not interested in becoming Union members.

On August 7th and 8th, thereafter, Respondent Union's representatives picketed Sears' Cherry Creek store. The first day, they picketed on the public sidewalk, adjacent to the store's south entrance, between 9:30 a.m. and 12:30 p.m.; on August 8th, Respondent Union picketed between 11:30 a.m. and 1:00 p.m. before the same store entrance. Since August 8th, further [illegible] and continuing, to date Respondent Union has picketed Sears' warehouse.

(This picketing has, likewise, been conducted on public property except for three or four days at the commencement of the picket line, when it was maintained on Sears' property. The pickets, however, moved when requested.)

The sidewalk picketing at Sears' Cherry Creek store was conducted by two pickets; near the warehouse, one or two persons have carried picket signs at various times. The signs which were carried before the Cherry Creek store, and which are still being carried at Sears' warehouse read as follows:

Front

FLOOR COVERING SOLD BY
SEARS ROEBUCK & CO
IS INSTALLED BY
UNDERPAID WORKERS
CARPET & LINOLEUM LAYERS
LOCAL #419

Reverse

NOTICE
FOR TOP QUALITY
WORK PATRONIZE
FIRMS EMPLOYING
UNION CARPET
& LINOLEUM LAYERS

The warehouse picketing is currently being conducted outside the only gate which provides warehouse access, Sears'

entire property being enclosed by a chain link fence. The picketing, generally, compasses the hours from 8:00 to 5:00 o'clock, which constitute the warehouse's working hours.

Lawrence Richardson, Sears' warehouse personnel manager and operating superintendent testified—without challenge or record contradiction—that some warehouse deliveries have been delayed, or have not been made, as a result of Respondent Union's picketing; he declared that Sears has been so advised by dispatchers for various motor carriers. Motion pictures taken by Richardson on August 9th, proffered for the record, show trucks of major motor carriers approaching Respondent Union's picket line outside the warehouse, turning around, and driving away. Richardson's credible testimony warrants a determination, further, that service organizations such as the telephone company, have, upon occasion, refused to honor requests to perform work at Sears' warehouse.

3. The Relationship Between Sears and Its Floor Covering Installers.

With matters in this posture, we confront the principal question litigated herein. General Counsel contends that Respondent Union's picket lines—with relation to Sears' premises specifically—violated and continue to violate the statute, because they derive from a dispute with respect to which Sears must be considered a neutral secondary employer; this Board is solicited to conclude that Complainant herein, contrary to Respondent Union's contention, cannot realistically be considered the specific primary "employer" with whom respondent labor organization maintains its dispute.

(Concededly, Section 8(b)(4)(B) does not prohibit a labor organization's primary economic action—for

example, picketing—against business enterprises, in furtherance of labor disputes which it may have with them. See *Denver Building and Construction Trades Council*, 341 U. S. 675. The section does, however, proscribe conduct calculated to bring pressure upon some primary employer, *through other business enterprises generally described as so-called "secondary" employers*, for the purpose of furthering such disputes.)

When Respondent Union herein characterizes its dispute with Sears as primary, so the argument runs, such mere "labeling" does not, *ipso facto*, permit its escape from Section 8(b)(4)(B)'s thrust. As General Counsel notes: If floor covering installers within the Denver metropolitan area can be considered significantly free from Sears' control—during the course of their business dealings with that firm—then Respondent Union's quarrel must lie directly with those installers, not with Complainant herein; necessarily, therefore, Respondent Union's picketing of Sears, *calculated to further that quarrel*, must be considered subject to statutory proscription.

Thus, General Counsel contends, herein, that various floor covering installers, with whom this case is concerned, function freely without that degree of Sears' control which would make Complainant their "employer" within Section 8(b)(4)'s meaning. More particularly, General Counsel declares, within his brief, that:

> A clear preponderance of the evidence shows that the installers are independent contractors and not employees within the meaning of the Act, and, further, that there is insufficient control of the operations of the contractors by Sears to link the contractors to Sears in such a fashion that Sears may be called an "ally" of the contractors in their dispute with the Respondent [Union].

The contention presents this case's basic question. We must, therefore, proceed to consider both the nature and scope of Sears' challenged relationship with floor covering installers, herein. To that question, this decision now turns.

a. *The Installers.*

Joe and Eddie's Carpet Service is a partnership, consisting of Joe Brase and Eddie Stimac, previously noted; they have one employee, Charles Duran. Duke Massey does business as a sole proprietorship known as Duke's Floor Covering; Frank Harris, likewise, functions as a sole proprietor, under the Frank Harris Tile Company name. Paul Clark, also a sole proprietor, does business as Clark Carpet Service; he has functioned under various similar names for some ten years. Clark has two employees, currently.

These enterprises—all of them—do business from the homes of their owners, designated. All have, however, made substantial investments in their several businesses, through the purchase of one or more trucks and tools related to their trade.

> (Their trucks, so far as the record shows, carry no identification calculated to designate them as belonging either to Sears, or their registered owners. Sears does not tell its contract installers what type of trucks to purchase, nor does Complainant inspect them, or require that they be inspected.)

They all carry their own contractor's liability insurance. Consistently with relevant Colorado law—presumably—Joe and Eddie, particularly, do not maintain workmen's compensation coverage, or pay State unemployment insurance taxes, for themselves or their workmen. Joe and Eddie, however, pay social security taxes for their partnership employee, and withhold State and Federal income taxes from his wages, which are paid from partnership funds.

(The employee, Charles Duran, is paid weekly; he receives an hourly rate, plus overtime pay when he works more than eight hours per day, together with a paid vacation and six paid holidays.)

Clark's two employees, likewise, receive an hourly wage. They are covered by the State workmen's compensation statute, but have no unemployment compensation coverage. Taxes and social security payments are, likewise, withheld from their paychecks. Neither installers, nor their workmen, wear any kind of Sears, or other, uniform. All maintain their own business bank accounts. Sears has never checked—nor does it reserve the right to check—their books and records. So far as the record shows, Sears has never provided installation training. Nor has Complainant ever loaned these floor covering installers money for the purpose of starting their several businesses, maintaining such businesses, purchasing tools, or supplementing their working capital.

b. *Their Relationship With Sears Distinguished From That of Regular Sears Employees.*

Unlike regular Sears workers, installers are not required to take physical examinations before being engaged; nor must they submit to other personnel interviews, or mental or psychological testing, prior to performing services. They are engaged directly through Sears' warehouse installation department manager, or store managers, pursuant to contract, and not through Complainant's personnel department. Further, unlike Sears' regular employees, they receive none of the fringe benefits—such as profit sharing, purchase discounts, paid vacations, paid holidays, hospitalization and life insurance—which Complainant offers.

(Together with numerous other policy-favored persons and institutions—such as firemen, policemen, delivery

company workers, store doctors, churches, schools, and charitable institutions—installers may receive a 10% discount pass when making retail purchases, on a limited one-day basis, from store managers.)

They do not report at set times daily, for work. Finally, unlike Sears regular workers—whose relationship with Complainant is governed by the firm's personnel manual—the relationship between Sears and these floor covering installers is governed by contract, as previously noted.

Within these contracts, the signatory installers are designated "contractors" throughout. The contracts begin with a recitation that Complainant herein "does not install certain materials" which it sells, together with a recitation that customers purchasing such materials may "desire to arrange for installation thereof" by some qualified contractor.

(Floor covering installers currently utilized by Sears may be privy to contracts varying slightly both in format and language. Between February, 1965, and April, 1967, Complainant had contractors sign a contract form which was subsequently modified, during the latter month. The modifications, within my view, merit characterization as merely technical. Harris, Massey and Crown Carpet currently perform their services for Complainant pursuant to January, 1967, contracts, drafted and signed on Sears' earlier contract form. Joe and Eddie's Carpet service, though currently functioning pursuant to a contract signed during August, 1967, then executed Sears' prior contract draft. Paul Clark, whose contractual privity with Sears presumably dates from August 14, 1968, signed a revised form. Since the two forms, however, reveal no significant differences, references to contractual language herein—when considered necessary—will be confined to that found in Complainant's current contract form.)

The contractor represents his willingness and desire to perform installation work "but only as an independent contractor and not as an employee" with respect to Complainant herein. The contractor agrees to accept jobs "tendered" within a designated territory, which he can satisfactorily perform. Further, the Contractor engages that he will "perform each job in a neat and workmanlike manner" consistently with "established trade practices" within the area, relevant laws, rules, regulations, ordinances or other lawful requirements, and Sears' job specifications. Likewise:

> Contractor agrees that upon receiving a job for installation from Sears, Contractor shall first determine whether the installation can be satisfactorily completed. If Contractor determines that he cannot complete the job satisfactorily, Contractor will notify Sears promptly and thereupon the tender of the job shall be deemed to be withdrawn from Contractor.

Installers guarantee that every job shall be free from defects in workmanship, for a period of one year from its completion. If defects in workmanship nevertheless appear, the installers contract to remedy such defects promptly; should they fail to do so, Sears or the customer is given the right to have the defects corrected at the installer's expense. Sears is given the right to hold and use any monies then or thereafter due the Contractor as reimbursement for any sums so paid. The contract, *inter alia*, mentions a so-called Schedule of Contractor's Charges calculated to fix Contractor's installation charges; Sears agrees that Contractors will be paid "on behalf of each of Sears customers" whatever installation charge may be specified within the Contractor's work order, (1) upon receipt of the Contractor's invoice following the job's completion, (2) following the Contractor's execution of certain necessary documents; and (3) upon Sears' concur-

rence that the job has been "satisfactorily and properly" completed. In that connection:

> The parties further agree that Contractor has the full right to determine, and the responsibility for, the method, manner and control of the work to be performed as specified in the written Proposal or the General Order to the Contractor, and Contractor will employ sufficient competent adult workmen to complete each job promptly and satisfactorily.

The Contractor is granted the sole and exclusive right to hire, direct, supervise and discharge any workmen he may employ, subject only to Sears' right "as agent for [the] customer" to request such a workman's withdrawal should any customer report himself not satisfied with the workmanship or progress of any job. The Contractor assumes full responsibility for all contributions, taxes and assessments on payrolls pursuant to applicable federal, state and local laws; he further agrees to protect, defend, hold harmless and indemnify Sears, together with its agents and employees, from and against claims, demands, actions, liabilities, losses and expenses suffered by any person, which arise from or may be considered in any way related to the Contractor's activities, work or services. The contract is negotiated for one year, subject to annual renewal thereafter. Both Sears and the Contractor, however, have rights of termination, during the contract's term or extended term, upon at least thirty days prior written notice.

c. *How Installers Receive Their Work.*

When a sale is consummated, the salesman's "Floor Covering Estimate and Proposal" does not state the date installation will take place. When necessary materials are received at Complainant's store or warehouse, however, some Sears employee (whether it be someone in the designated warehouse office, or someone within the concerned

store's customer service department) communicates with the customer to arrange a convenient installation date. This being done, two copies of the firm's Estimate and Proposal, which the installer designated to do the work must receive, are put in boxes or pigeonholes, from which he may subsequently procure them.

The installer, when he comes to Sears, proceeds to his box, picks up the documents noted—which constitute his so-called "work order" for the job—procures the materials required, and goes on his way, presumably to perform whatever work may have been tendered.

Credible testimony proffered by various installers—without contradiction—reveals some variant practices in this connection. Sears has established no fixed reporting requirements; floor covering installers are not *required* to report at specific times, or even at all. Thus—with respect to Joe and Eddie's Carpet Service particularly—the record reveals: That the partners generally visit Sears' Westland Store daily, Mondays excepted; that, sometimes, they may perform work for other customers first, and then visit Complainant's store; that they do not, therefore, report at particular times; that they normally work about eight hours per day; that they do not themselves, receive overtime compensation from Sears or other customers should they work more than eight hours; but that they pay their own workman overtime. And Massey's comparable testimony—which stands without contradiction—warrants determinations: That he tries to pick up all of his assignments on Monday, for the coming week; that he normally works, thereafter, about thirty hours per week (on *all* his work), making some $10 per hour; that, when he does perform Sears' work, he normally stops to pick up his required materials between 8:30 and 9:00 o'clock, drinks coffee until 9:30 or 10:00 o'clock, then goes to work; that

there are days when he performs Sears' work on which he has no contract with persons at Sears' premises.

(None of the floor covering installers punch a time-clock. So far as the record shows, should one not wish to work, he flouts no duty.)

Harris, so he testified, works for Sears between 25-30 hours per week; he averages $60 per day for each day's work. He does not feel required to visit Sears daily; when he does so, he usually reaches the warehouse at 9:30 a.m. approximately.

When they do report, the floor covering installers—as previously noted—pick up their work folders, and then procure the materials required for their installations. Such materials are procured directly, either at Sears' store dock or warehouse; the Complainant does not deliver floor covering, neither to the customer's jobsite or residence, nor to contractors. With respect to floor covering materials pickups, further, the record shows that Joe and Eddie locate, pick up and load their own materials at Sears' dock. They will sometimes pick up several days' work at one time; materials thus procured may be stored in their garages, or left on their truck. They have left Sears' material in their garages, sometimes, for a couple of weeks.

(When supplied by Sears, neither hard surface materials nor carpet materials are pre-cut or pre-sewn in any fashion. Carpet materials are received by these installation contractors in rolls which approximate the correct square yardage required for the particular job. All cutting and sewing is done within the customer's home.)

Sears does not supply any material to carpet layers save the carpet and pad materials which Complainant sells. When linoleum or tile is sold, Sears likewise sells the paste

and metal fixtures required for installation; the hard surface material layer, however, supplies any required underlayment or base.

Sears' job tenders do not take into account such factors as where the material layers live; assignments are made on the basis of the installer's availability.

In that connection, further, the record shows that Joe and Eddie's Carpet Service does not work for Sears on Mondays; they work a Tuesday through Friday week. Comparably, Massey only works three days per week for Sears, since he works for another major customer, J. C. Penney's, the other two days.

> (All Sears' floor covering contractors mentioned in the present record have other customers within the Denver metropolitan area. Their charges may vary, as between customers, depending on their work. They can and do schedule significant amounts of work for their other customers on the same days they do Sears' work. When this is done, they may handle their several jobs in any order they choose, and need not perform Sears' work first. However, should a Sears' customer be promised some particular time of day for his work, the installers will *try* to meet that commitment.)

Normally, the person or department responsible for Sears' job tenders—with regard to floor covering installation work—takes into account whatever work load limitations particular installers may have set. Stating the matter otherwise, these installers are tendered jobs, daily, which will not exceed their own, previously stated, limitations. Thus, Joe and Eddie's Carpet Service, normally will be given jobs which require them to lay no more than roughly 100-150 yards per day. Massey and Harris—within the field of hard surface floor coverings—do about $60 worth of work per day; this normally represents about five-six

hours of work. Joe and Eddie have, sometimes, further limited the amount of work which they will perform on a given day by telling the Sears' representative responsible for assignments to schedule only so much, or not to schedule any more jobs for that day than she already has. Sears —as far as the record shows—complies. Additionally, Joe and Eddie may determine, themselves, which of them will perform particular jobs tendered.

d. *How the Work Is Performed.*

When floor covering materials have been procured, the contractor concerned may proceed to the customer's home, or call the customer to arrange a time which is convenient for him. He may likewise take the material home and leave it there, until he is ready to perform the work. Sears does not tell installers what customer to visit first, how early to arrive, or how late to stay; nor are directions given as to how the customer's home may be reached. The record shows—in this connection—that Joe and Eddie may, sometimes call Sears' customers and reschedule work with them, without notice to Complainant's store or warehouse. Likewise, they may make independent arrangements to come back to a customer's house the following day, should they be unable to reach a job or complete a job within a single day—all of this without notice to Sears' customer service or installation departments.

Massey, seemingly, follows a different procedure. Whenever he cannot reach a particular Sears' customer's job, he will call Sears and advise them, directly, regarding the job's postponement.

Installers receive no directions from Sears with regard to how floor coverings should be installed. They receive nothing more, with regard to particular jobs, than the salesman's rough drawn delineation of the specific room or living area within the customer's home to be covered.

(The salesman's prepared Estimate and Proposal form may or may not have such a diagram. In any event, whatever diagram there may be is not drawn to scale. Rather than a specific direction to installers, with regard to how floor covering should be laid, it seemingly does little more than help the salesman in consummating the sale.)

Sometimes, with respect to carpet installations, the diagram will show where seams are to be located; carpet layers, however, are not required to follow the drawing. They often ignore it, and put seams elsewhere, when, within their judgment, that would make for a better job. They may also modify the specified job in various other respects. When this is done—so far as Joe and Eddie is concerned—no notice is given Complainant herein, nor is prior clearance requested.

Though the contracts between Sears and various floor covering craftsmen require the latter to refrain from doing extra work for Sears' customers—such as taking up old carpet and relaying it within another room—without written authorization, the practice of most installers is clearly contrary. Joe Brase testified regarding two such instances, for which the customer paid directly; his testimony was corroborated, generally, by his partner.

(Massey, when queried in this connection, testified that he tells the customer to call a Sears salesman, because the customer is usually looking for a cut rate.)

Harris, so his testimony shows, does such extra work occasionally; sometimes he even sells the customer material for such extra work from his own stock. Paul Clark—though he has only worked for Sears since August 1968, has performed work for Sears customers, beyond that specified on Sears' job proposal, three times. Sears, so far as the record shows, gets no notice, and takes no reprisals in such situations; nor has it promulgated a flat prohibition.

Upon occasion, when busy, Joe and Eddie's Carpet Service has subcontracted Sears work to another person; this, without Sears' prior knowledge. That person has been paid with partnership funds. Harris, likewise, has had Massey perform Sears' work when he has been unable to do so. Complainant, on this occasion, likewise received no notice; Harris sent in the bill, and thereafter paid Massey himself. Harris has, likewise, negotiated directly with a Sears' customer for installation work, when the customer had made no arrangements with Sears, when his material was purchased, for such work.

Floor covering installers are responsible for repairing—without further charge—any of their work which may prove defective; likewise, they are responsible for any damage they may do. Should they be notified regarding a customer's complaint with respect to their work, however, they may normally schedule the required repairs at their convenience.

(Sears' current contract form grants the firm the right to condition payment of the contractor's installation charge "upon inspection by and approval of Sears that the job has been satisfactorily and properly completed" consistently with the salesman's Estimate and Proposal form. So far as the record shows, however, Sears' right of inspection is seldom exercised. Whether a complaint requires inspection will be determined as a matter of business judgment. Defective work, normally, will be brought to the craftsman's attention through customer complaints, which may be made either through Sears, which relays them, or directly.)

Massey, so his testimony shows, tries to get any necessary repair work done within a couple of weeks; Joe and Eddie's Carpet Service try to get theirs done sooner. Should installers be called upon to perform repairs on someone

else's work, or to replace defective materials, they charge their regular prices. For such supplementary work, however, prices are not pre-determined. Massey, so his testimony shows, charges prices which he, himself, fixes for repair or replacement jobs; he has never had a bill rejected under such circumstances.

Floor covering installers have the contractual right to reject any work which Sears has tendered; they have, upon numerous occasions, exercised that right following their first visit to the prospective customer's home. Such rejections may derive from various considerations; these may compass the craftsman's belief that the job cannot be performed properly as described within the firm's Estimate and Proposal form, or his belief that he cannot make money on the job. Thus, for example: Joe Brase testified—with general corroboration—that he refused a particular job in May, 1968, because he did not feel that the way the customer and the Sears' salesmen wanted the job performed was the proper way. His testimony shows that he left the job, and that he returned only after the customer had called Sears and concurred with Brase's recommendation regarding the way the work should be done. Clark—so the record shows—has rejected Sears' work twice since August 14, 1968. Massey, likewise testified that he had rejected work several times. Stimac's testimony reveals a rejection, with respect to part of a proffered job, because he did not believe he could do a good job, consistently with Sears' specifications.

e. *How Installers Are Paid.*

When Sears has—within the recent past—undertaken to establish a working relationship with some particular floor covering installer, Complainant's warehouse installation department manager, or some appropriate person within Sears' Denver managerial hierarchy, has negotiated

with that "contractor" regarding a so-called price list which details the prices to be charged and paid for installation work. General Counsel, within his brief, notes—correctly—that, within the present record, there was much divergent testimony concerning the precise way various prices *charged to Sears* by different installers originated. However, that testimony—within my view—need not be recapitulated in detail. By way of summary, I find merit in General Counsel's comment, within his brief, with respect thereto:

> The critical thread which runs throughout the testimony of those involved in the determination of the price lists is this—the greater portion of the prices currently in effect were proposed and initiated by the installers. Further, in those situations where prices were initiated by Sears, the installers involved engaged in meaningful negotiation as to the prices.

For example, Paul Clark's testimony shows that he initiated his first contract with Sears, seeking installation work. Clark, when he discussed the possibility of procuring installation work with Chandler, Sears' warehouse installation department manager, proposed or "bid" certain prices for various types of work which were acceptable to the latter. The prospective contractor, likewise told Chandler that he felt his proposed prices would subsequently have to be revised upward; Chandler, so I find, concurred.

Massey and Harris, so the record shows, together presented a revised price list, sometime early during 1968; they sought Chandler's concurrence regarding a proposed increase in the various rates which they were being paid. Their testimony, regarding the precise form of the list which they presented, was contradictory. However, my record review has persuaded me that—regardless of the form which their proposal may have taken—these hard surface floor covering craftsmen themselves initiated the sug-

gestions which Chandler subsequently accepted, save for certain fixture moving charges.

Testimony which Division Manager McNally, Brase and Stimac proffered, likewise, supports such a determination, relative to their negotiations. I find that Brase and Stimac, too, were initiators with respect to prices.

With respect to certain recent 1967 negotiations between the Crown Carpet Company, and another carpet laying contractor with whom Sears no longer deals, on the one hand, and Sears, Area Group Manager Donald Jansen, on the other, the record does show that Jansen, rather than the designated installers, was responsible for broaching discussions looking toward a change to *lower* base "per square yard" prices. However, the craftsmen—so I find—presented a written counter-proposal, nevertheless, for further price modifications calculated to cover "special" contingencies, which, within their view, would more precisely and equitably reflect the complexity of some of the work which they were doing; with respect to these installer proposals, as well as Sears' lower base price proposal, consensus was finally reached.

The price lists drafted, pursuant to these negotiations, consistently set different rates of installers' compensation (Sears' cost) for various types of work—which may present varying degrees of difficulty and require varying degrees of skill.

> (The record, further, warrants a determination that—despite these negotiated prices—situations may still develop with respect to which new negotiations are required, because previously set price lists may not cover some specific contingency or because the installers may *refuse* to perform work, judged to be more complex and difficult, for previously negotiated prices.)

These price lists provide the basis for those installation charges which may be noted on Sears' Floor Covering Estimate and Proposal forms; store salesmen compute their customers' installation charges from price lists which, in turn, derive from the prices which installers charge the Complainant herein. When Sears' customer service representatives or warehouse installation department personnel can readily compute—from their salesman's Estimate and Proposal form—what the installation contractor's charge should or will be, that figure will be calculated, and proper notations will be made, wherever necessary, within the proper spaces on the contractor's job documents. Should the designated Sears' representative be unable to determine a proper contractor's charge, these documents will be forwarded within Complainant's job folder with no stated charge shown.

> (While the contractor's total charge has generally been entered on the work orders given the linoleum and tile layers, through Sears' warehouse, the space for such notations has frequently been left blank on those issued Joe and Eddie by Sears' Westland store.)

The record, however, clearly warrants a determination that the total contractor's price noted by Sears does not bind the floor covering installers concerned. These "contractors" are the final judges with respect to their own final charges. Those who testified, herein, declared—consistently—that they have changed Sears' total price notation whenever it did not, for any reason, correctly reflect the work performed. Division Manager McNally of Sears' Westland store conceded that Joe and Eddie have done this many times, with or without explanations.

When a job is completed and the particular craftsman concerned desires to be paid, he sends Complainant herein —wherever he originally picked up his work documents—

the proper copy of Sears' Estimate and Proposal form previously received (No. 4 copy), together with a Sears originated invoice form.

(These documents may be turned in whenever the installer finishes his job; they may, however, be retained and accumulated before submission, for a week, or as long as the installer desires.)

If Sears' Proposal form (No. 2 copy) did not contain a notation stating the contractor's charge, he will make the necessary entry, based on his previously negotiated price list. Whenever he has performed extra work, directly related to whatever specific installations may have been directed, he may *add* charges for such work to the total sum which Sears' representative may previously have entered; whenever the total charge computed by the Sears' representative has been misfigured, the contractor may note a *correction*. Such changes are, generally, made without Sears' authorization, though the contractor may have given Complainant notice of his intention to make a change, where large sums are concerned. In all three situations, Sears regularly changes its records, and pays the installer whatever sum he claims is owed, for the job or jobs covered. So far as the record shows, no bill ever submitted for a job or jobs, with respect to which the prices were first computed or recomputed by the contractor, has ever been rejected.

When paying floor covering installers, Sears withholds no sums to cover Social Security or Federal Income taxes; nor is there any percentage withheld to cover possible installation mistakes.

C. *Conclusions.*

1. The Installers are Independent Contractors.

The legal standard pursuant to which a determination must be made as to whether the floor covering installers, herein, must be considered independent contractors or employees involves the so-called "right to control" test. Cf. *Local No. 2265, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Carpet Center, Inc.)*, 170 NLRB No. 93. The test has been declared relevant and proper, with judicial concurrence; it has been utilized many times. See, *e.g. Pure Seal Dairy Company*, 135 NLRB 76, 79. Within the case last cited, the Board formulated this legal standard as follows:

> In determining the status of persons alleged to be independent contractors, the Act requires the application of the "right to control" test. Where the person for whom the services are performed retains the right to control *the manner and means* by which the result is to be accomplished, the relationship is one of employment. On the other hand, where control is reserved only as to *the result sought*, the relationship is that of independent contractor. The resolution of this question depends upon the facts of each case and no one factor is determinative. (Emphasis supplied.)

When the facts of the present case are reviewed, with reference to this legal standard, their clear preponderance shows—within my view—that Sears does *not* retain the right to control *the manner and means* by which floor coverings which it sells will be installed. Rather, control is reserved *merely* with respect to the *result* sought. The floor covering craftsmen concerned herein, therefore, must be considered independent contractors. The Board's previously noted *Carpet Center* decision—which confirmed a Trial Examiner's determination, finding carpet installa-

tion workers to be employees of the respondent company therein designated—specified some six facets of the particular company-installer relationship, therein found, which the Trial Examiner and Board considered determinative. No more than one of these listed, however, can be considered characteristic of the company-installer relationship which this record reveals.

> (The Trial Examiner's *Carpet Center* decision refers to the fact that respondent company therein, should it find the work of particular installers displeasing in any respect, may discipline or get rid of them by withholding future assignments. Sears, with its installation contracts, likewise maintains such a right. I would consider the designated right consistent with either an "independent contractor" or "employee" determination.)

Within the Trial Examiner's decision noted, some ten further characteristics which mark *Carpet Center's* relationship with its carpet installation workers are mentioned. Practically none of these, however, can be considered descriptive of Sears' relationship with the floor covering contractors which are herein concerned.

> (First, the Trial Examiner's *Carpet Center* decision, among other things, notes that the manager of respondent company therein, when he assigns work to particular installers, takes into account both the number of yards to be laid, and where the installers live, trying to give them work near their homes. Sears' job tenders, directed to particular carpet layers, likewise, take into account the total number of yards to be laid. The present record, however, shows that those job assignment limitations which Sears will recognize derive from directives which the concerned installers have themselves laid down, rather than from Com-

plainant's departmental policies. Further, Sears' job tenders are proffered without regard for the particular contractor's geographical convenience. Secondly, while Sears' contractors—like *Carpet Center's* workmen—are themselves required to load materials they may need for various jobs, this record warrants no determination that they are normally permitted or required to search for such materials, personally, within Sears' warehouse or departmental storage facilities. Thirdly, contractors are presumably requested or required—like *Carpet Center's* workmen—to give Sears notice, whenever they will be unavailable for work because of vacations, sickness, or for some other reasons; nothing in the present record, however, warrants a determination that Sears maintains a definitive rule or regulation, regarding the time limits before which such prior notice must be given. There is some record suggestion that such notices may, sometimes, not be given.)

Within his decision, the Board's *Carpet Center* Trial Examiner found—with respect to that firm's installation craftsmen—that "certain aspects of their relationship with the company" would, despite his contrary conclusion, tend to support a possible independent contractor determination. My reading of the decision noted reveals some five "aspects" characteristic of the relationship therein considered which might, arguably, have suggested such a conclusion. The present record, *inter alia*, reveals these selfsame five "aspects" likewise operative herein, coupled with others, when we consider the nature and scope of Sears' relationship with its various Denver floor covering installation contractors.

Such considerations, within my view, clearly require a determination—contrary to Respondent Union's suggestion

herein—that *Carpet Center* presents a situation factually distinguishable, from that which the present record reveals, regarding the nature of the relationship which Respondent Union herein, through its challenged course of conduct, presumably sought to modify.

This Board has previously declared that its resolution of so-called "independent contractor" questions, through what has been designated the "right to control" test, will depend upon the facts of each case, with no single factor considered determinative. The trier of fact, therefore, finds no necessity, herein, presently to recapitulate, *seriatim*, those several factors marking Sears' relationship with various floor covering installation contractors which dictate its final characterization as one falling within the statutory "doing business" concept. Rather, I find it sufficient to declare, broadly that, their relationship—*when considered in totality as detailed within the present record*—merits a characterization consistent with General Counsel's contention herein.

(Previously, within this decision, passing references have been made to certain partially contradictory testimony proffered by General Counsel's witnesses, regarding the precise format of their suggested price list for linoleum and tile installation work, when they presented that list to Sears' warehouse installation department manager for negotiation. The first witness, Massey, testified that Chandler had been presented with proposals regarding the compensation which *Harris and he* wished to *receive* for various types of work related to linoleum and tile laying. Thereafter, Harris testified—differently—that Chandler was given proposals regarding the sums which Sears' *customers* should be *charged* for various tasks connected with linoleum and tile installation work; this proposal, so

Harris declared, was drafted because of their presumption that Sears would, finally, determine *their compensation* by applying a predetermined percentage figure to whatever sums Complainant's customers may have been *charged* for installation services. While testifying, Harris produced a purported copy of the document which Chandler had been given; that document supports his recollection, since it shows proposed "selling" prices for installation work done in connection with Sears' linoleum and tile sales. With matters in this posture, Harris' testimony regarding the proposal's format—which Chandler substantially corroborated—merits credence. Having reached this conclusion, however, I reject Respondent Union's presumptively consequent contention that such a proposal, dealing with Sears' *selling* prices, suggests a consensus—shared by Chandler on the one hand, and both hard surface contractors on the other—that their price list negotiations were really *employer-employee* discussions. I note, in this connection, that the proposed price list—despite its form—was initiated by these installers; both were seeking higher compensation. Further, I note that Chandler's final response—with respect to which both Massey and Harris later concurred—was prepared to show Sears' linoleum and tile work *costs;* rather than Sears' proposed *customer charges*, it listed the specific sums which *Massey and Harris* would, thereafter, *receive*. And in any event, whether or not my conclusion is considered sound, these Chandler-Massey-Harris negotiations, within my view, possess no compelling or crucial significance. When considered in perspective, *within the context which the complete record provides*, such negotiations can hardly be considered, themselves, sufficiently substantial or significant to warrant a rejection of General Counsel's position.)

Counsel for Respondent Union did, finally, produce a document culled from Sears' file wherein Complainant's various contractors were, substantially, directed to procure some designated insurance coverage, some sort of Federal Account number, and to have their contract notarized. Chandler's decision to promulgate these directives, however cannot—with due regard for the whole record—be considered sufficient to dictate a conclusion that he was addressing employees, or to vitiate my determination that Sears' floor covering installers held "independent contractor" status.

These installers, then, must be considered independent businessmen. And since Sears' concern, with respect to their work, is limited merely to such work's final result, Complainant's business relationship with them cannot be considered sufficiently close to destroy its neutrality. Complainant's counsel, within his brief, suggests—in this connection—that:—

> It is important in analyzing this record to understand that the installation of floor covering is not an integrated part of our business and in arranging for the installation Sears has not delegated the function normally performed, nor ever performed, by regular Sears employees; the customer is expressly told that Sears will not do the installation . . . In our situation the fact that Sears will find an installer for the customer is merely an aid in selling the merchandise; Sears has not replaced an integrated employee operation with an outside contractor.

These factual contentions, within my view, have record support; I concur. Further, nothing within the record would warrant a determination that Sears claims any power or right to determine labor relations policy for or with these floor covering installation contractors. Necessarily, therefore, Respondent Union's grievance could only be resolved

by them, not by Complainant herein; I so find. Under no circumstances can these floor covering firms be considered "allies" with respect to Sears, concerning a dispute which the latter firm could resolve. Nor can the reverse be considered true. Respondent Union's contrary contention must be rejected.

2. Respondent Union's Conduct Violates the Statute.

Once a determination has been made that the various carpet, linoleum and tile layers whom Sears utilized for floor covering installation work must be considered independent contractors, there can be no doubt that Respondent Union herein—determined to procure a settlement of differences with Joe and Eddie's Carpet Service particularly—relied upon statutorily proscribed means to pursue objectives statutorily forbidden. I so find. Regarding this portion of General Counsel's case, Complainant's counsel, within his brief, notes:

> . . . that the Respondent attempted to make [Joe Brase, Eddie Stimac and Charles Duran] become members; that they refused to join; that upon their refusal to join they were picketed; that, when the picketing failed to have any effect, the Respondent began and continued to picket Sears. The object of the picketing at Sears can be and is only to force Sears to stop doing business with the installers until they join the Union.

This trier of fact finds counsel's statement both factually correct, and legally persuasive. The Supreme Court has clearly held that peaceful picketing—comparable with Respondent Union's picketing with which this case is concerned—constitutes "inducement" and "encouragement" statutorily proscribed. *N. L. R. B. v. Electrical Workers*, 341 U. S. 694, 701-702. Such a conclusion with respect to this case may be—indeed must be—considered warranted even though Respondent Union's picket lines, on some oc-

casions, may not have been successful. *N. L. R. B.* v. *Denver Building Trades Council*, 193 F. 2d 421 (C. A. 10). Respondent Union's pickets have, however, had a discernible effect. True, the record may show nothing reliable or probative regarding their success, or lack of success, when they picketed Joe and Eddie's Carpet Service, specifically—nor may it show persuasively what success, if any, Respondent Union had when it picketed Sears' Cherry Creek store. With respect to Sears' warehouse, however, Respondent Union's picket line clearly brought results. Deliveries were delayed, or were not made. Such a record showing warrants a determination that Respondent Union's picket line was—despite the mild language found on its picket signs—reasonably calculated to induce or encourage individuals, employed by persons or business enterprises engaged in commerce, to refuse, in the course of their employment to transport, or otherwise handle or work on goods, articles, materials, or commodities, or to perform services. I so find. Further, Respondent Union's picket line—to the extent that it was succesful—effectively threatened, coerced and restrained Sears directly.

Respondent Union's proscribed object, likewise, must be considered manifest. The Union's original purpose was shown when Joe and Eddie's Carpet Service was picketed, while the partners and their workman were performing work within a customer's home. When such picketing produced no tangible result, Respondent Union commenced its picketing of Complainant herein. As General Counsel notes—within his brief—the only conclusion which can properly be drawn when a labor organization pickets a commercial firm "doing business" with some independent contractor, with whom that labor organization has a dispute, must be the conclusion that at least "an" object of respondent labor organization's picket line is the forced cessation of that business relationship. I so find.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent Union and its designated representatives, set forth in Section III above—since they occurred in connection with the business operations of Complainant herein previously noted—have had a close, intimate, and substantial relation to trade, traffic, and commerce among the several States. Absent correction they would tend to lead, and in this instance have led, to labor disputes burdening and obstructing commerce, and the free flow of commerce.

V. The Remedy.

Since it has been found that Respondent Union and its representatives did engage, and continue to engage, in certain unfair labor practices, it will be recommended that they cease and desist therefrom, and take certain affirmative action, including the posting of appropriate notices, designed to effectuate the policies of the Act, as amended.

Conclusions of Law.

In the light of these findings of fact, and upon the entire record in this case, I make the following conclusions of law:

1. Sears, Roebuck and Co. is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and business activities which affect commerce within the meaning of Section 2(6) and (7) of the Act, as amended.

2. Joe Brase and Eddie Stimac, d/b/a Joe and Eddie's Carpet Service Company; Crown Carpet, Inc.; Paul E. Clark, d/b/a Clark Carpet Service; Frank Harris, d/b/a Frank Harris Tile Company; Daryl Massey, d/b/a Duke's Floor Covering; Joseph Mozzicato; John Erpelding, d/b/a Sea-Ro Tile Company; and Gerald Fallert, d/b/a G. & H.

Tile Company, are persons engaged in commerce, or in an industry affecting commerce, within the meaning of Section 2(6) and (7) of the Act, as amended.

3. Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act, as amended.

4. By inducing and encouraging individuals employed by Sears, or by other persons engaged in commerce or in an industry affecting commerce, to refuse, in the course of their employment, to transport or otherwise handle or work on goods, materials, articles or other commodities, or to perform services—for the purpose of forcing or requiring Sears to cease using, selling, handling, transporting, or otherwise dealing in the products of, and to cease doing business with, Joe and Eddie's Carpet Service, Clark Carpet Service, Frank Harris Tile Company, Duke's Floor Covering, Joseph Mozzicato, Sea-Ro Tile Company, and G. & H. Tile Company—Respondent Union has committed an unfair labor practice within the meaning of Section 8(b)(4)(i)(B) of the Act, as amended.

5. By threats, coercion or restraint, directed both to Sears, Roebuck and Co. and other persons engaged in commerce or in an industry affecting commerce—for the purpose of forcing or requiring such persons to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer processor, or manufacturer, and to cease doing business with other persons—the Respondent Union has committed an unfair labor practice within the meaning of Section 8(b)(4)(ii)(B) of the Act, as amended.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act, as amended.

Recommended Order.

Upon these findings of fact and conclusions of law, and upon the entire record in the case, it is recommended that the Board, pursuant to Section 10(c) of the National Labor Relations Act, as amended, order that respondent labor organization, Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, together with its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Inducement or encouragement of any individual employed by Sears, or by any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or refusal, in the course of his employment, to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services, where an object thereof is to force or require Sears, Roebuck and Co., or any other person, to cease doing business with Joe and Eddie's Carpet Service Company, Clark Carpet Service, Frank Harris Tile Company, Duke's Floor Covering, Joseph Mozzicato, Sea-Ro Tile Company, G. & H. Tile Company, or any other person;

(b) Threatening, coercing or restraining Sears, Roebuck and Co., or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require Sears, or any other person, to cease doing business with the partnership and several sole proprietorships designated within the preceding subparagraph.

2. Take the following affirmative action which will effectuate the policies of the Act, as amended.

(a) Post in conspicuous places at its business offices and meeting halls, including all places where notices to

members are customarily posted, copies of the notice attached to this report as an appendix.[1] Copies of this notice, to be furnished by the Regional Director for Region 27, as the Board's agent, shall be posted immediately upon their receipt, after being duly signed on behalf of respondent labor organization by its duly designated representative. Once posted, it shall remain posted for 60 consecutive days thereafter. Reasonable steps shall be taken by respondent labor organization to insure that this notice is not altered, defaced, or covered by any other material;

(b) Sign and mail sufficient copies of this said notice to the Regional Director for Region 27 for posting by Sears Roebuck and Co., this recipient being willing, at all locations where notices to employees and installation contractors are customarily posted;

(c) File with the Regional Director of Region 27, as the Board's agent, within 20 days of the service of this decision, a written statement setting forth the manner and form in which it has complied with these recommendations.[2]

Dated:

/s/ Maurice M. Miller,
Trial Examiner.

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1. In the event that this Recommended Order is adopted by the Board, the words "A Decison and Order" shall be substituted for the words "The Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "A Decision and Order."

2. In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 27, in writing, within 10 days from the date of this Order, what steps it has taken to comply herewith."

APPENDIX.

NOTICE.

To All Members of Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO.

PURSUANT TO

The Recommended Order of a Trial Examiner of the NATIONAL LABOR RELATIONS BOARD and in order to effectuate the policies of the NATIONAL LABOR RELATIONS ACT (As Amended)

we hereby notify you that:

WE WILL NOT induce or encourage anyone employed by Sears, Roebuck and Co., or by any other person engaged in commerce—or in an industry which affects commerce—to engage in a strike or refusal—in the course of his employment—to use, manufacture, process transport or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services—for the purpose of forcing or requiring Sears Roebuck and Co., or any other person, to cease doing business with Joe and Eddie's Carpet Service Company, Clark Carpet Service, Frank Harris Tile Company, Duke's Floor Covering, Joseph Mozzicato, Sea-Ro Tile Company, G. & H. Tile Company, or any other person.

WE WILL NOT threaten, coerce or restrain Sears, Roebuck and Co., or any other person engaged in commerce—or in an industry which affects commerce—by maintaining picket lines, or by any other means—for

the purpose of forcing or requiring Sears, Roebuck and Co., or any other person, to cease doing business with the partnerships and sole proprietorships named in the paragraph above.

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO
(Labor Organization)

Dated..... By.....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If members have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 260 New Custom House, 721—19th Street, Denver, Colorado, 80202, Telephone No. 297-3551.

APPENDIX E.

STATUTE INVOLVED.

National Labor Relations Act
(61 Stat. 136, 29 U. S. C. § 151, et seq.)

Sec. 8(b)(4)(B); (29 U. S. C. § 158(b)(4)(B)):

"It shall be an unfair labor practice for a labor organization or its agents. . .

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; * * *"

SEC. 10(e), (f), (g), (h), (j) and (l); (29 U. S. C. § 160(e), (f), (g), (h), (j) and (l)):

"(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if sup-

ported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court, as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless spe-

cifically ordered by the court, operate as a stay of the Board's order.

(h) When granting temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115).

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (1) (A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia)

within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further*, That such officer or regional attorney shall not apply for any restraining order under section 8(b)(4) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D)."

APPENDIX F.

UNITED STATES DISTRICT COURT

For the District of Colorado.

(Filed United States District Court, Denver, Colorado, Aug. 29, 1968. G. Walter Bowman, Clerk.)

CLYDE F. WAERS, Regional Director of the Twenty-Seventh Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, *Petitioner*, *vs.* CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION No. 419, AFL-CIO, *Respondent.*	Civil No. C-1052.

PETITION FOR INJUNCTION UNDER SECTION 10(l) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED.

To: *The Honorable, the Judges of the United States District Court for the District of Colorado:*

COMES NOW Clyde F. Waers, Regional Director of the Twenty-Seventh Region of the National Labor Relations Board (herein called the Board), and petitions this Court for and on behalf of the Board, pursuant to Section 10(l)

of the National Labor Relations Act, as amended, 61 Stat. 149; 73 Stat. 544; 29 U. S. C. Sec. 106(1) (herein called the Act), for appropriate injunctive relief pending the final disposition of the matters involved herein pending before the Board on charges alleging, *inter alia*, that Respondent has engaged in, and is engaging in acts and conduct in violation of Section 8(b)(4)(i)(ii), subparagraph (B) of the Act. In support thereof, Petitioner respectfully shows as follows:

1. Petitioner is Regional Director of the Twenty-Seventh Region of the Board, an agency of the United States, and files this petition for and on behalf of the Board.

2. Jurisdiction of this Court is invoked pursuant to Section 10(l) of the Act.

3. On or about August 9, 1968, Sears, Roebuck and Co. (herein called Sears), pursuant to the provisions of the Act, filed a charge with the Board alleging, *inter alia*, that Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO (herein called Respondent), a labor organization, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(4)(i)(ii), subparagraph (B) of the Act. Copies of said charge are attached hereto as Exhibit 1 and made a part hereof.

4. The aforesaid charge was referred to Petitioner as Regional Director of the Twenty-Seventh Region of the Board.

5. Upon the basis of the following, the Petitioner has reasonable cause to believe that the charge filed on August

9, 1968, alleging the Respondent violated Section 8(b)(4)(i)(ii), subparagraph (B) of the Act, is true and that a complaint of the Board, based on said charge under Section 8(b)(4)(i) and (ii), subparagraph (B) of the Act should issue against Respondent pursuant to Section 10(b) of the Act. More particularly, the Petitioner has reasonable cause to believe, and believes, that Respondent is a labor organization within the meaning of Section 2(5), 8(b), and 10(l) of the Act, and has engaged in and is engaging in acts and conduct in violation of Section 8(b)(4)(i)(ii), subparagraph (B) of the Act, affecting commerce within the meaning of Sections 2(2) (6) and (7) of the Act, as follows:

(a) Respondent, an unincorporated association, is an organization in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers, concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(b) Respondent maintains its principal office at 1125—15th Street, Denver, Colorado; and at all times material herein, Respondent has been engaged within this judicial district in transacting business and in promoting and protecting the interests of the employee members of the Respondent.

(c) Sears, a New York corporation, is engaged at Denver, Colorado, as a retail department store. In the course and conduct of its business, Sears distributes and sells annually within the State of Colorado goods and other merchandise, having a gross value in excess of $500,000, of which more than $50,000 is transported directly to the State of Colorado from points outside that State.

(d) At all times material herein, Sears has maintained a retail department store at 2375 East 1st Avenue, Denver, Colorado, and has maintained a warehouse at 1701 West 6th Avenue, Denver, Colorado.

(e) Sears is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act.

(f) Joe and Eddie's Carpet Service (herein called Joe and Eddie's), is a partnership engaged in the business of carpet installing in Denver, Colorado. In the course and conduct of its business, Joe and Eddie's regularly provide services to Sears, among others.

(g) Daryl Massey, an individual, d b a Duke's Floor Covering (herein called Duke's), is engaged in the business of installing floor coverings in Denver, Colorado. In the course and conduct of its business, Duke's regularly provides services to Sears, among others.

(h) Joseph Mozzicato (herein called Mozzicato), an individual, is engaged in the business of installing floor coverings in Lakewood, Colorado. In the course and conduct of his business, Mozzicato regularly provides services to Sears, among others.

(i) Francis H. Harris, an individual, d b a Frank Harris Tile Company (herein called Harris), is engaged in the business of installing floor coverings in Denver, Colorado. In the course and conduct of its business, Harris regularly provides services to Sears, among others.

(j) John Erpelding, an individual, d b a Sea Ro Tile (herein called Sea Ro), is engaged in the business of installing floor coverings in Denver, Colorado. In the course and conduct of its business, Sea Ro regularly provides services to Sears, among others.

(k) Gerald Callert, an individual, d b a G & H Tile

(herein called G & H), is engaged in the business of installing floor coverings in Denver, Colorado. In the course and conduct of its business, G & H regularly provides services to Sears, among others.

(l) Paul E. Clark, an individual, d b a Clark Carpet Service (herein called Clark), is engaged in the business of installing floor coverings in Denver, Colorado. In the course and conduct of its business, Clark regularly provides services to Sears, among others.

(la) Elmer Neff, Jr., an individual, d b a E & R Carpets (herein called E & R), is engaged in the business of installing floor coverings in Denver, Colorado. In the course and conduct of its business, E & R regularly provides services to Sears, among others.

(n) Since on or about July 15, 1968, Respondent has demanded that Joe and Eddie's recognize and bargain with it as the representative of the employees of Joe and Eddie's.

(o) At no time material herein has Respondent had any labor dispute with Sears.

(p) In furtherance of its demand referred to above in subparagraph (n), and for reasons unrelated to its relationship with Sears, on August 8, 1968, and since that date, Respondent did authorize, establish and maintain pickets at the premises of Sears at its warehouse at 1701 West 6th Avenue, Denver, Colorado, and on August 7, 1968, until August 9, 1968, Respondent did authorize, establish and maintain pickets at the premises of Sears at its retail store at 2375 East 1st Avenue, Denver, Colorado.

(q) By the acts and conduct set forth in subparagraph (n) above, Respondent has engaged in, and has induced and encouraged individuals employed by Sears and by other persons engaged in commerce or in industries affecting commerce, to engage in, strikes or refusals in the

course of their employment to use, manufacture, process, transport, or otherwise handle or work on goods, articles, materials, or commodities, or to perform services, and has threatened, restrained, and coerced Sears and other persons engaged in commerce or in industries affecting commerce.

(r) An object of the acts and conduct engaged in by Respondent set forth in subparagraphs (p) and (q) above, was and is to force or require Sears to cease using, selling, handling, transporting, or otherwise dealing in the products of and to cease doing business with Joe and Eddie's, Duke's Mozzicato, Harris, Sea-Ro, G & H, Clark, and E & R.

6. It may fairly be anticipated that, unless enjoined, Respondent will continue or repeat the acts and conduct set forth in paragraph 5, subparagraphs (p), (q), and (r) above, or similar or like acts and conduct in violation of Section 8(b)(4)(i)(ii), subparagraph (B) of the Act. It is therefore essential, appropriate, just and proper, for the purpose of effectuating the policies of the Act, and in accordance with the provisions of Section 10(l) thereof, that, pending final disposition of the matters involved herein pending before the Board, Respondent be enjoined and restrained from the commission of the acts and conduct above alleged, similar acts and conduct, or repetitions thereof.

WHEREFORE, Petitioner prays:

1. That the Court issue an order directing Respondent to appear before this Court, at a time and place fixed by the Court, and show cause, if any there be, why an injunction should not issue enjoining and restraining Respondent,

its officers, representatives, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with them, pending the final disposition of the matters involved herein pending before the Board from:

(a) Picketing at or in the vicinity of the premises of Sears, or at or in the vicinity of any other person engaged in commerce or in an industry affecting commerce doing business with Joe and Eddie's, Duke's, Mozzicato, Harris, Sea-Ro, G & H, Clark, and E & R.

(b) In any manner or by any means, including picketing, orders, directions, instructions, requests, or appeals, however given, made or by any like or related acts or conducts, or by permitting any such to remain in existence or effect, engaging in, or inducing or encouraging any individual employed by Sears, or by any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any service, or in any manner or by any means, threatening, coercing, or restraining Sears, or any other person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is to force or require Sears or any other person to cease using, selling, handling, transporting, or otherwise dealing in the products of or to cease doing business with Joe and Eddie's, Duke's, Mozzicato, Harris, Sea Ro, G & H, Clark, and E & R.

2. That upon return of said Order to Show Cause, the Court issue an Order enjoining and restraining Respondent in the manner set forth above.

3. That the Court grant such further and other relief as may be just and proper.

Dated at Denver, Colorado, this 29th day of August, 1968.

/s/ CLYDE F. WAERS,
Clyde F. Waers, Regional Director, Twenty-Seventh Region, National Labor Relations Board.
Room 260, New Custom House,
721—19th Street,
Denver, Colorado, 80202.

ARNOLD ORDMAN,
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FRANCIS SPERANDEO,
Regional Attorney, Region 27.

/s/ RICHARD J. WISE,
Board Attorney.

National Labor Relations Board,
Twenty-Seventh Region,
Room 260 New Custom House,
721—19th Street—Denver, Colorado, 80202,
297-3551.

EXHIBIT 1.

Form NLRB-508
(12-65)

Form Approved
Budget Bureau No. 64-R003.12

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

Instructions: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

Do Not Write In This Space
Case No. 27-CC-278
Date Filed August 9, 1968

1. Labor Organization Or Its Agents Against Which Charge Is Brought
   a. Name
   Carpet and Linoleum Layers Union, Local 419
   b. Union Representative to Contract
   Mr. G. Cooney
   c. Phone No.
   244-4884
   d. Address Street, city, State and ZIP code)
   1129 15th Street, Denver, Colorado
   e. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b), subsection (4) (i) (ii) (B) of the National

(List Subsections)